

11609  
United States 1603  
Circuit Court of Appeals

For the Ninth Circuit.

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS  
WAREHOUSE COMPANY, INC.,  
Appellant and Cross-Appellee,

vs.

BANK OF CHINA, BANK OF COMMUNICATIONS,  
EXCHANGE BANK OF CHINA, CHINA & SOUTH  
SEA BANK, AGRICULTURAL AND INDUSTRIAL  
BANK OF CHINA, CHINESE AMERICAN BANK  
OF COMMERCE, CHUNG YUAN INDUSTRIAL  
BANK, NATIONAL COMMERCIAL BANK LIM-  
ITED, BANK OF AGRICULTURE & COMMERCE,  
BANQUE FRANCO-CHINOISE and SHIH FU  
SHENG,

Appellees and Cross-Appellants.

Transcript of Record.


Upon Appeal and Cross-Appeal from the United States  
Court for China.

FILED

APR 13 1929

PAUL P. O'BRIEN,

CLERK



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NAMES AND ADDRESSES OF ATTORNEYS  
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APPEARANCES:

Messrs. KENT & MOUNSEY, Tientsin, China,  
For Plaintiffs.

Messrs. FLEMING, FRANKLIN & ALLMAN,  
26 The Bund, Shanghai, China,  
For Defendant.

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In the United States Court for China.

Cause No. 3067—Civil No. 1293. Complaint.  
Filed at Shanghai, China, April 27, 1928. (Sd.)  
L. T. Kenake, Assistant Clerk.

BANK OF CHINA, BANK OF COMMUNICA-  
TIONS, EXCHANGE BANK OF CHINA,  
CHINA & SOUTH SEA BANK, AGRI-  
CULTURAL AND INDUSTRIAL BANK  
OF CHINA, CHINESE AMERICAN BANK  
OF COMMERCE, CHUNG YUAN INDUS-  
TRIAL BANK, NATIONAL COMMER-  
CIAL BANK, LTD., BANK OF AGRICUL-  
TURE & COMMERCE, BANQUE  
FRANCO-CHINOISE and SHIH FU  
SHENG,

Plaintiffs,

vs.

R. T. McDONNELL, Assignee, AMERICAN  
OVERSEAS WAREHOUSE COMPANY,  
INCORPORATED,

Defendant.

## COMPLAINT.

Come now the plaintiffs and, complaining of the defendant, for cause of action declare that:

1. The plaintiffs are banking institutions of Chinese nationality with the exception of the Banque Franco-Chinoise, which is of French nationality, and Shih Fu Sheng, who is a Chinese citizen holding the position of compradore to the Far Eastern Bank of Harbin at Tientsin.

2. The defendant is an American citizen who by deed dated the 1st day of August, 1927, was appointed assigned of a portion of the assets of the American Overseas Warehouse Company, Incorporated, a company with limited liability registered under the laws of the State of Delaware. The said company is hereafter referred to as the Warehouse Company.

3. As such assignee the defendant assumed charge of the godowns of the Warehouse Company and of such merchandise as was held on storage by the said company as warehousemen.

4. The plaintiffs are severally holders of warrants issued by the Warehouse Company which call collectively for the delivery [1\*] of 996,500 bags of flour of various brands. The said warrants have been submitted to the defendant and recognized by him, and such recognition has been confirmed by letter dated the 5th day of April, 1928, which is

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\*Page-number appearing at the foot of page of original certified Transcript of Record.



attached hereto. There is also attached hereto warrant No. 3671 in favour of the Bank of China which is in the form of the several warrants above mentioned and which was the usual form of warrant issued by the Warehouse Company.

5. On or about the 9th day of July, 1927, the plaintiffs demanded delivery of the said 996,500 bags of flour against the said warrants, but the Warehouse Company refused to make any deliveries and on investigation by Messrs. Borrows and Company, Limited, a firm of surveyors, it was estimated that the godowns of the Warehouse Company contained 91,895 bags of flour which on count was corrected to 91,666 bags only.

6. The said flour being part of the merchandise taken over by the defendant as stated in paragraph 3 hereof was sold, with the consent of the warrant holders, on or about the 16th day of September, 1927. The said flour realized a sum of \$300,489.86 which is held by the defendant.

7. On or about the 17th day of January, 1928, the defendant issued a proposal for distribution of the said sum of \$300,489.86, a copy of which is attached hereto.

8. The said scheme of distribution includes an allotment in favour of the National City Bank of New York, amounting to \$53,137.32.

9. The plaintiffs deny that the National City Bank of New York is entitled to the said sum of \$53,137.32 or to any sum in respect of the said flour, and the plaintiffs claim that the said sum should be distributed amongst such of their number as hold

warrants calling for flour of the brands in question. Subject to such readjustment the plaintiffs accept the proposals of the defendant. [2]

The plaintiffs therefore claim:

1. That the defendant as such assignee is indebted to the plaintiffs severally in sums aggregating \$300,489.86, less expenses.

2. That the defendant shall hold the said sum of \$300,489.86, less expenses, for the account of the plaintiffs and shall distribute the same proportionately amongst the plaintiffs in accordance with the principle of the defendant's proposal for distribution above referred to copy of which is attached hereto.

3. Costs.

4. Such further and other relief as to this Honorable Court seems meet.

(Sd.) P. H. B. KENT,  
Counsel and Attorney for Plaintiff. [3]

EXHIBIT "A."

THE AMERICAN OVERSEAS WAREHOUSE  
CO., INC.

Head Office:

WILMINGTON, DELAWARE, U. S. A.  
HSIN CHUNG BUILDING, TIENTSIN.

April 5, 1928.

Ref. No. 2004.

Messrs. Kent and Mounsey,  
Tientsin.

Dear Sirs:

I have for acknowledgment your letter of March

28th and I quote therefrom that portion to which you wish a reply.

“Under Rule 103 of what is known as the Extraterritorial Remedial Code, it is required that all original documents on which claims are based shall be attached to the complaint. In this case the original documents are godown warrants, all of which have been admitted by yourself and therefore should not require to be proved again. We propose in the complaint to state the numbers of the godown warrants and add that they have been admitted by yourself as Assignee.”

In your complaint you may state that in my capacity as Assignee for the American Overseas Warehouse Company, I have admitted those godown warrants which have been submitted to me by you on behalf of your clients.

Yours very truly,  
(Sd.) R. T. McDONNELL,  
Assignee.

RTMcD:ms. [4]

[On reverse side:]

For BANK OF CHINA, TIENTSIN,  
(Signed) .....,  
Manager.

## EXHIBIT "B."

No. 3671.

THE AMERICAN OVERSEAS WAREHOUSE,  
CO., INC.

27 Seymour Road, Tientsin.

GODOWN WARRANT.

TIENTSIN, June 3, 1927.

Received the undermentioned goods in apparent good condition to be stored for account of BANK OF CHINA Fifteen thousand (15,000) Bags Pyramid Flour.

This warrant covers insurance against Loss on damage by Fire or Lightning subject to the ordinary conditions of fire insurance.

The declared value of the warrant on the above mentioned goods is M\$60,000 but in case of fire, the damage will be paid not exceeding the market value immediately anterior to the fire.

N. B. Not responsible for loss or damage by Earthquake, Typhoons, Storm, Floods, Effect of Climate and/or other Acts of God.

Responsible only for the delivery of the cargo in the condition received taking no cognizance of the contents of the packages.

All transfer of ownership of cargo to be immediately endorsed on this warrant. All charges against goods to be fully paid at the date of transfer.

All charges to be fully paid on delivery of all merchandise.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Signed) .....  
Asst. Manager. [5]

EXHIBIT "C."

AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.

(In Liquidation)

PROPOSED DISTRIBUTION OF PROCEEDS FROM SALE OF FLOUR

The results were arrived at as follows:

From the amount available for distribution, \$300,489.86, three per cent or \$9,014.70 was deducted as trustee's fee leaving a balance of \$291,475.16.

This amount, \$291,475.16 was prorated on the basis of the total proceeds of the sale, \$301,561.02, resulting in the following percentages:

Lotus .....	30741	per cent	=	\$ 89,602.38
Green Battleship .....	35763	"	=	104,240.26
Wheelbarrow .....	14423	"	=	42,039.46
Green Bamboo .....	04961	"	=	14,460.08
Egyptian .....	04984	"	=	14,527.12
Plain .....	07162	"	=	20,875.45
Double Fish .....	01024	"	=	2,984.71
Queen .....	00092	"	=	268.16

Green Castle .....	00303	“	=	883.17
Red Castle .....	00182	“	=	530.49
Mixed .....	00365	“	=	1,063.88

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1.00000 per cent    \$291,475.16

The amount allocated to each brand was then prorated among the claimants. Plain was regarded as without brand and grouped and apportioned as Shanghai, Canadian and American plain. Double Fish, Queen and Mixed were not specifically claimed and the total amount received from these brands was prorated among all claimants.

#### BANK OF CHINA

Lotus .....		\$3,050.30
Wheelbarrow .....		9,342.10
Double Fish, Queen & Mixed .....		238.68
		<hr/>
Total .....		\$12,361.08

#### BANK OF COMMUNICATIONS

Lotus .....		\$ 15,251.47
Double Fish, Queen & Mixed .....		74.59
		<hr/>
Total .....		\$ 15,326.06

[6]

#### CHINA & SOUTH SEA BANK

Green Castle .....		\$ 883.17
Egyptian .....		6,718.79
Lotus .....		15,251.47
Green Battleship .....		43,554.42

Wheelbarrow .....	26,469.29
Shanghai Plain .....	6,125.13
American Plain .....	4,375.09
Double Fish, Queen & Mixed .....	1,704.32

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Total .....\$105,081.68

#### CHINESE AMERICAN BANK OF COMMERCE

Egyptian .....	\$ 2,179.07
Lotus .....	15,251.47
Green Battleship .....	10,162.70
Wheelbarrow .....	6,228.07
Canadian Plain .....	5,000.11
Double Fish, Queen & Mixed .....	691.80

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Total .....\$39,513.22

#### BANQUE FRANCO-CHINOISE

Egyptian .....	\$ 726.36
Lotus .....	5,719.30
Green Battleship .....	17,421.76
Double Fish, Queen & Mixed .....	242.41

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Total .....\$24,109.83

#### NATIONAL COMMERCIAL BANK

Red Castle .....	\$ 530.49
Lotus .....	9,150.88
Green Battleship .....	11,614.52
Double Fish, Queen & Mixed .....	231.22

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Total .....\$21,527.11



## FAR EASTERN BANK OF HARBIN.

## Compradore's Office.

Green Bamboo.....	\$14,460.08
Shanghai Plain.....	1,000.02
Double Fish, Queen & Mixed.....	104.42
	<hr/>
Total .....	\$15,564.52

## EXCHANGE BANK OF CHINA.

American Plain.....	\$1,250.03
Double Fish, Queen & Mixed.....	55.94
	<hr/>
Total .....	\$ 1,305.97

## BANK OF AGRICULTURE &amp; COMMERCE.

Egyptian .....	\$2,179.07
Double Fish, Queen & Mixed.....	223.76
	<hr/>
Total .....	\$2,402.83

AGRICULTURAL & INDUSTRIAL BANK OF  
CHINA.

Egyptian .....	\$726.36
Double Fish, Queen & Mixed.....	74.59
	<hr/>
Total .....	\$800.95

## CHUNG YUAN INDUSTRIAL BANK.

Double Fish, Queen & Mixed.....	\$74.59
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## NATIONAL CITY BANK OF NEW YORK.

Egyptian .....	\$ 1,997.47
Lotus .....	25,927.49



Green Battleship .....	21,486.86
Shanghai Plain .....	3,125.07
Double Fish, Queen & Mixed.....	600.43
	<hr/>
	\$53,137.32

## SUMMARY.

Bank of China.....	\$ 12,631.08
Bank of Communications.....	15,326.06
China & South Sea Bank.....	105,081.68
Chinese American Bank of Commerce..	39,513.22
Banque Franco-Chinoise .....	24,109.83
National Commercial Bank.....	21,527.11
Far Eastern Bank .....	15,564.52
Exchange Bank of China.....	1,305.97
Bank of Agriculture & Commerce.....	2,402.83
Agricultural & Industrial Bank of China.	800.95
Chung Yuan Bank.....	74.59
National City Bank of New York.....	53,137.32
	<hr/>
Total .....	\$291,475.16

NOTE: The amount \$300,489.86 is drawing interest at the rate of 2% per annum and the total accrued at date of final distribution will be pro rated among all claimants.

R. T. McDONNELL,

Trustee. [7]

United States of America,  
Extraterritorial Jurisdiction in China,  
Consular District of Tientsin,—ss.

The affiant Percy Horace Braund Kent, being first duly sworn, deposes and says that he is counsel

and the duly constituted attorney for the plaintiffs in the above-entitled action, and is personally acquainted with the circumstances of the plaintiffs' claim that he has read and signed the foregoing complaint, and knows the contents thereof and that the facts therein stated are true.

(Sgd.) P. H. B. KENT.

Subscribed and sworn to before me this 20th day of April, 1928.

[Seal] (Sgd.) \_\_\_\_\_,  
Vice-Consul of the United States of America at  
Tientsin.

(Fee Stamp.)

Misc.  
Service  
No. 908.

[8]

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Cause No. 3067—Civil No. 1293. Answer. Filed at Tientsin, China, May 18, 1928. (Sgd.) James M. Howes, Clerk.

[Title of Court and Cause.]

ANSWER.

Now comes the defendant above named and for answer unto the plaintiffs' complaint respectfully shows unto this Honorable Court as follows:

1.

The defendant admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the plaintiffs' complaint.

2.

The defendant denies the allegations contained in paragraph 9 of the plaintiffs' complaint, and alleges that the National City Bank of New York is the owner and holder of six certain godown warrants or trust receipts issued to said bank by the said American Overseas Warehouse Company, Inc., which call collectively for the delivery of 161,000 bags of flour of various brands, and therefore said Bank is entitled to participate *pro rata* in the distribution referred to in plaintiffs' complaint. [9]

WHEREFORE defendant prays that the plaintiffs' complaint be dismissed at plaintiffs' cost, and that he be given such other and further relief as to the Court may seem meet and just in the premises.

Dated at Tientsin, China, May 18, 1928.

(Sgd.) R. T. McDONNELL,  
Defendant.

United States of America,  
Extraterritorial Jurisdiction in China,  
Consular District of Tientsin,—ss.

The affiant, R. T. McDonnell, being first duly sworn, deposes and says that he is the defendant in the above-entitled action; that he has read the foregoing answer, knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

(Sgd.) R. T. McDONNELL,

Subscribed and sworn to before me this 18th day of May, 1928.

(Sgd.) JAMES M. HOWES,  
Clerk. [10]

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Cause No. 3067—Civil No. 1293. Reply. Filed at Tientsin, China, 22 May, 1928. (Sgd.) James M. Howes, Clerk.

[Title of Court and Cause.]

### REPLY.

Now come the plaintiffs and respectfully show unto this Honorable Court by way of reply to the answer herein:

1. The plaintiffs deny that the National City Bank of New York is the holder of any godown warrants or documents of the American Overseas Warehouse Company, Incorporated, entitled to rank with the warrants held by the plaintiffs.

2. The plaintiffs admit that the said Bank holds certain documents bearing an endorsement by the said Warehouse Company as follows:

“We have received the goods mentioned in this instrument and will hold same to the order of THE NATIONAL CITY BANK OF NEW YORK and we hereby transfer all our rights under this instrument to THE NATIONAL CITY BANK OF NEW YORK.”

But the plaintiffs deny that the said goods were

ever received by the said Warehouse Company as alleged in the said endorsement.

3. By way of alternative defense to the defendant's claim on behalf of the National City Bank of New York, the [11] plaintiffs deny that if any of the said goods were received by the said Warehouse Company, they were received under such *con*-conditions as constituted a valid pledge thereof.

4. By way of further alternative defense the plaintiffs deny that if any part of the said goods were ever received by the said Warehouse Company under such conditions as to constitute a valid pledge thereof, the said Warehouse Company continued to retain the same or had any property therein in respect of any such pledge or hypothecation on or about the 9th day of July, 1927, when the said Company ceased to do business and from which date the assignment by the said Company to the defendant as assignee operated.

(Sgd.) P. H. B. KENT,  
Attorney for Plaintiffs. [12]

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EXHIBIT No. 1.

(Cause 3067—Exhibit 1.)

Tls.80,111.00/100                      Tientsin, April 5, 1927.

On Demand for Value Received, I/We Unconditionally Promise to pay to the Order of the American Overseas Warehouse Company, Inc. at The National City Bank of New York, Tientsin, China, the Principal Sum of Eighty Thousand and 00/100 Tientsin Taels, Together with Interest

Thereon from Date at the Rate of 10 Per Cent Per Annum Until the Said Principal is Paid.

The undersigned has deposited with said Company as collateral security for the payment of this and any and every liability or liabilities of the undersigned to said company direct or contingent, due to or to become due, or which may hereafter be contracted or existing, and whether the same may have been or shall be participated in whole or part to others by trust agreement or otherwise, or in any manner acquired by or accruing to said Company whether by agreement with the undersigned or by assignment or by endorsement to it by any one whomsoever, the following property, viz.:

10,000 bags (net 49 lbs. each) Shanghai	
Flour @ 3.60 .....	\$36,000.00
35,000 bags (net 49 lbs. each) Egyptian	
Flour @ 3.60.....	126,000.00
60 bales Gunny Bags 400 bags each @ .60	14,400.00
	<hr/>
	\$176,400.00

together with all other securities in the possession of said Company, belonging to the undersigned or in which the undersigned has an interest, with authority to repledge and or all of the said goods and/or securities hereby agreeing to deliver to said Company additional securities to its satisfaction upon its demand; also hereby giving the said Company a lien for the amount of all said liabilities of the undersigned to said Company upon all property or securities which now are or may hereafter be pledged with said Company by the under-



signed, or in the possession of said Company in which the undersigned has any interest. On the non-performance of said promise or upon the non-payment of any of said liabilities, or upon the failure of the undersigned forthwith to furnish satisfactory additional security on demand at the option of said Company, this obligation shall become immediately due and payable, and said Company is hereby given full power to collect, sell, assign and deliver the whole of said securities or any part thereof or any substitutes therefor, or additions thereto, through any stock exchange, broker's board, or broker or at private sale without advertisement or notice, the same being hereby expressly waived; or said Company at its option may sell the whole or any part of said securities or property at public sale, upon notice published once in any newspaper printed in the Province of Chihli not less than three (3) days prior to such sale, at which public sale said Company may purchase said securities or property or any part thereof free from any right of redemption on the part of the undersigned, which is hereby expressly waived and released. Upon any such sale, after deducting all costs and expenses of every kind, said Company may apply the residue of the proceeds of such sale as it shall deem proper toward the payment of any one or more or all of the liabilities of the undersigned to said Company whether due or not due, returning the overplus to the undersigned and in the event of sale of such security/ies, if the amount realized be insufficient

to pay off this obligation and all interest, costs and charges then accrued, the undersigned agree/s and hereby promises to pay the deficiency then remaining unpaid, on demand of said Company or other holder or owner of this obligation.

The undersigned agrees to pay all expenses of warehousing and preserving the said property and all expenses incurred by the said Company in keeping said property in good condition; to deliver to the Company on the execution of this obligation valid and sufficient fire insurance policies, covering the goods hereby pledged, in the name of the Company, with authority to the Company, if no such policies are delivered to it, to keep the said goods insured and the expense of said insurance to be a lien on the said goods.

The undersigned hereby authorizes any attorney-at-law in the Province of Chihli or elsewhere at any time after the above sum becomes due to appear for the undersigned in any Court in the Province of Chihli or elsewhere, and to waive the issuing and service of process and confess judgment against the undersigned in favor of the payee or any holder of this note for the amount appearing due and the costs of suit and thereupon to release all errors and waive all rights of appeal and stay of execution. The makers of this note, when more than one, shall be jointly and severally liable hereon. The undersigned further agrees to pay all attorneys' and collection fees, costs of court, publication, sale and expenses of every kind



which may be incurred in enforcing payment of this note.

No. 16/1927.

Due 6 weeks—O. K.

THE UNION TRADING CORPORATION,  
INCORPORATED.

(Signed) .....

General Manager.

We have received the goods mentioned in this instrument and will hold same to the order of THE NATIONAL CITY BANK OF NEW YORK and we hereby transfer all our rights under this instrument to THE NATIONAL CITY BANK OF NEW YORK.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Sgd.) C. H. CORNISH,

General Manager. [13]

EXHIBIT No. 2.

(Cause 3067—Exhibit 2 (sheet 1).

Tls.30,000.00/100.

Tientsin, April 8, 1927.

On Demand for Value Received, I/We Unconditionally Promise to Pay to the Order of the American Overseas Warehouse Company, Inc. at the National City Bank of New York, Tientsin, China, the Principal Sum of Thirty Thousand and 00/100 Tientsin Taels, Together with Interest Thereon from Date at the Rate of 10 Per Cent Per Annum Until the Said Principal is Paid.

The undersigned has deposited with said Company as collateral security for the payment of this

and any and every liability or liabilities of the undersigned to said company direct or contingent, due to or to become due, or which may hereafter be contracted or existing, and whether the same may have been or shall be participated in whole or part to others by trust agreement or otherwise, or in any manner acquired by or accruing to said Company whether by agreement with the undersigned or by assignment or by endorsement to it by any one whomsoever, the following property, viz.:

10,000 bags (net 49 lbs. each) Green Bat-	
tleship Brand Flour @ 3.40.....	\$34,000.00
10,000 bags (net 49 lbs. each) Red Bat-	
tleship Brand Flour @ 3.40.....	34,000.00
	<hr/>
	\$68,000.00

together with all other securities in the possession of said Company, belonging to the undersigned or in which the undersigned has an interest, with authority to repledge and or all of the said goods and/or securities hereby agreeing to deliver to said Company additional securities to its satisfaction upon its demand; also hereby giving the said Company a lien for the amount of all said liabilities of the undersigned to said Company upon all property or securities which now are or may hereafter be pledged with said Company by the undersigned, or in the possession of said Company in which the undersigned has any interest On the non-performance of said promise or upon the non-payment of any of said liabilities, or upon the failure of the undersigned forthwith to furnish satisfactory addi-

tional security on demand at the option of said Company, this obligation shall become immediately due and payable, and said Company is hereby given full power to collect, sell, assign and deliver the whole of said securities or any part thereof or any substitutes therefor, or additions thereto, through any stock exchange, broker's board, or broker or at private sale without advertisement or notice, the same being hereby expressly waived; or said Company at its option may sell the whole or any part of said securities or property at public sale, upon notice published once in any newspaper printed in the Province of Chihli not less than three (3) days prior to such sale, at which public sale said Company may purchase said securities or property or any part thereof free from any right of redemption on the part of the undersigned, which is hereby expressly waived and released. Upon any such sale, after deducting all costs and expenses of every kind, said Company may apply the residue of the proceeds of such sale as it shall deem proper toward the payment of any one or more or all of the liabilities of the undersigned to said Company whether due or not due, returning the overplus to the undersigned and in the event of sale of such security/ies, if the amount realized be insufficient to pay off this obligation and all interest, costs and charges then accrued, the undersigned agree/s and hereby promises to pay the deficiency then remaining unpaid, on demand of said Company or other holder or owner of this obligation.

The undersigned agrees to pay all expenses of

warehousing and preserving the said property and all expenses incurred by the said Company in keeping said property in good condition; to deliver to the Company on the execution of this obligation valid and sufficient fire insurance policies, covering the goods hereby pledged, in the name of the Company, with authority to the Company, if no such policies are delivered to it, to keep the said goods insured and the expense of said insurance to be a lien on the said goods.

The undersigned hereby authorizes any attorney-at-law in the Province of Chihli or elsewhere at any time after the above sum becomes due to appear for the undersigned in any Court in the Province of Chihli or elsewhere, and to waive the issuing and service of process and confess judgment against the undersigned in favor of the payee or any holder of this note for the amount appearing due and the costs of suit and thereupon to release all errors and waive all rights of appeal and stay of execution. The makers of this note, when more than one, shall be jointly and severally liable hereon. The undersigned further agrees to pay all attorneys' and collection fees, costs of court, publication, sale and expenses of every kind which may be incurred in enforcing payment of this note.

No. 17/1927.

Due 6 weeks—O. K.

THE UNION TRADING CORPORATION,  
INCORPORATED.

(Sgd.).....,

General Manager. [14]

We have received the goods mentioned in this instrument and will hold same to the order of THE NATIONAL CITY BANK OF NEW YORK and we hereby transfer all our rights under this instrument to THE NATIONAL CITY BANK OF NEW YORK.

THE AMERICAN OVERSEAS WAREHOUSE CO. INC.

(Sgd.) WILLIAM P. HUNT,  
Acting Manager.

(Copy)

(Exh. 2, sheet 2.)

No. 3621

THE AMERICAN OVERSEAS WAREHOUSE  
CO., INC.

27 Seymour Road, Tientsin.

GODOWN WARRANT.

Tientsin, April 8, 1927.

Received the under mentioned goods in apparent good condition to be stored for account of National City Bank of New York.

Ten Thousand (10,000) Bags Green Battleship Brand Flour.

Ten Thousand (10,000) Bags Red Battleship Brand Flour.

This warrant covers insurance against Loss on damage by Fire or Lightning subject to the ordinary conditions of fire insurance.

The declared value of this warrant on the above mentioned goods is M\$68,000.00/100 but in case of



fire, the damage will be paid not exceeding the market value immediately anterior to the fire.

N. B. Not responsible for loss or damage by Earthquake, Typhoons, Storms, Floods, Effects of Climate and/or other Acts of God.

Responsible only for the delivery of the cargo in the condition received taking no cognizance of the contents of the packages.

All transfer of ownership of cargo to be immediately endorsed on this warrant. All charges against goods to be fully paid at the date of transfer.

All charges to be fully paid on delivery of all merchandise.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Seal) (Sgd.) WILLIAM P. HUNT,  
Acting Manager. [15]

EXHIBIT No. 3.

American Overseas Warehouse Co.

(Cause 3067—Exhibit 3.)

THE NATIONAL CITY BANK OF NEW YORK.

IN CONSIDERATION OF THE NATIONAL CITY BANK OF NEW YORK (hereinafter referred to as the said Corporation) allowing me/us the undersigned to overdraw my/our account with the said Corporation or to open an overdrawn account with the said Corporation, I/we hereby pledge to the said Corporation as security for the repayment to the said Corporation on demand of all amounts due or which hereafter may become

due from me/us to the said Corporation, as well as for all interest on such overdrawn account at the rate or rates charged by the Corporation and all costs and charges, all Stocks, Shares and Securities which I/we may have already deposited with the said Corporation, or which may be in their possession as also all Stocks, Shares and Securities which I/we may hereafter deposit with the said Corporation or which may hereafter come into their possession. AND I/we the undersigned hereby constitute and appoint as my/our Attorney for the purposes hereinafter mentioned the Manager or Agent for the time being in Tientsin of the said Corporation and specially authorize and empower him to fill up and complete any incomplete transfer attached to any of such Stocks, Shares and Securities, and to insert his name or that of any other nominee of the said Corporation therein as transferee of the Shares and Securities enumerated therein, and to sign, or as the case may be, to sign, seal, execute and deliver any such transfer or other document that may be necessary or required for the purpose of completing the title of the said Corporation to any of such Stocks, Shares, and Securities, and register the same in the books of the Corporation to which the same relates, and obtain fresh scrip for the Shares and Securities enumerated therein in his own name or in that of any other employee of the said Corporation without any reference to or consent of me/us. Also to sell and absolutely dispose of all or any such Stocks, Shares and Securities in such manner as he may

think fit without any reference to or consent of me/us. AND I/we hereby agree at the request of such Manager or Agent of the said Corporation to sign, or, as the case may be, to sign, seal, execute and deliver any transfer or other document that may be necessary or required by the said Corporation for the purpose of completing the title of the said Corporation to any of such Stocks, Shares and Securities. AND I/we further authorize the said Corporation to reimburse themselves out of the proceeds of any sale all costs, charges, and expenses incurred by them in transferring and selling all or any of such Stocks, Shares and Securities. AND I/we declare that the said Corporation shall not be responsible for any loss from or through any brokers or others employed in the sale of any of such Stocks, Shares and Securities, or for any loss or depreciation in value of any of such Stocks, Shares and Securities arising from or through any cause whatsoever. AND any deficiency whatsoever and however arising, I/we agree to make good and pay on demand to the said Corporation. AND it is further agreed that the said Corporation shall have a lien on all such Stocks, Shares and Securities or on the proceeds after sale thereof (if sold) as security for or in part payment of any other debt due or liability then incurred or likely to be incurred by me/us to the said Corporation. AND I/we further authorize the said Corporation to collect all dividends and bonuses payable or hereafter paid in respect of any of such Stocks, Shares and Securities, and engage to sign all such further



documents as may be necessary effectually to vest in the said Corporation the property in the said Stocks, Shares and Securities, and the dividends and bonuses payable in respect thereof [16] or to effect the selling or transferring of the same. AND I/we further agree at all times to keep up the value of such Stocks, Shares and Securities. And in the event of a temporary or permanent depreciation in value of any of such Stocks, Shares and Securities at the request of the said Corporation or the Manager or Agent for the time being either to pay to the said Corporation in money the difference between the market value of any of such Stocks, Shares and Securities, on the date when they were deposited with or came into the possession of the said Corporation and on the date when such payment as aforesaid may be made, or to deposit with the said Corporation other approved Stocks, Shares and Securities, equivalent in value to the market deterioration. AND in the event of my/our failing to comply with such request I/we hereby authorize the said Corporation or the Manager or Agent for the time being to immediately exercise all or any of the powers hereby conferred upon them and him. AND I/we lastly declare that the said Corporation or the Manager or Agent for the time being shall not be answerable or responsible for any damage or depreciation which any of such Stocks, Shares and Securities may suffer whilst in their possession under this Agreement.

IN WITNESS WHEREOF I/we have hereunto set my/our hand and seal this 2d day of September, one thousand nine hundred and twenty-six.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Sgd.) C. H. CORNISH, (Seal)  
General Manager.

Signed, sealed and delivered by . . . . ., in the presence of . . . . .,

(Signed) . . . . . [17]

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In the United States Court for China.

Cause No. 3067—Civil No. 1293. Decision and Judgment. Filed at Shanghai, China, July 16, 1928. James M. Howes, Clerk.

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK, LTD., BANK OF AGRICULTURE & COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,

Plaintiffs,

vs.

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE,

Defendant.

## DECISION AND JUDGMENT.

The plaintiffs in this case are banking institutions of Chinese nationality, with the exception of the Banque Franco-Chinoise, which is of French nationality, and Shih Fu Sheng, who is a Chinese citizen holding the position of comprador to the Far Eastern Bank of Harbin at Tientsin, China. The defendant is an American citizen who by deed, dated the 1st day of August, 1927, was appointed assignee of a portion of the assets of the American Overseas Warehouse Company, Inc., a company with limited liability registered under the laws of the State of Delaware. As such assignee, the defendant assumed charge of the godowns of the Warehouse Company, and of such merchandise as was held in storage by said company as a warehouseman. The plaintiffs are severally holders of godown warrants, or warehouse receipts, issued by the Warehouse Company, which collectively call for the delivery of 996,500 bags of flour of various brands. Said warrants, or godown receipts, have been submitted to the defendant and recognized by him as having been duly issued to the holders thereof by the American Overseas Warehouse Company. Warrant No. 3671, in favor of the Bank of China, is attached to and made a part of the complaint for the purpose of showing the form of the several warrants held with the plaintiffs herein, and as the usual [18] form of warrant issued by the warehouse company. On or about the 9th day

of July, 1927, and before the appointment of the assignee herein, the plaintiffs demanded delivery of said 996,500 bags of flour upon presentation of their said warrants, but the warehouse company refused to make any deliveries thereof, and upon an investigation by Messrs. Barrows & Co., Ltd., a firm of surveyors, it was estimated that the godowns or warehouses of the warehouse company contained but 91,895 bags of flour, which on a recount was corrected to 91,666 bags only. These 91,666 bags of flour were subsequently taken possession of by the defendant upon his appointment as assignee on the 1st of August, 1927, and was sold by him on or about the 16th day of September, 1927, by and with the consent of all the warrant holders. From the sale of said flour there was realized the sum of Mex. \$300,489.86, which sum was thereafter, and up and until the trial of this case, held by the defendant as such assignee. Thereafter, to wit, on or about the 17th day of January, 1928, the defendant as assignee issued a proposal in writing for the distribution, among the various claimants of said flour, of the said sum of \$300,489.86, a copy of which said proposal is attached to the complaint and made a part thereof. It appears from such proposal, that the plan or scheme of distribution of said monies in the hands of the assignee contemplated and provided for an allotment to and in favor of the National City Bank of New York, amounting to the sum of \$53,137.32.

It is the contention of the plaintiffs that the National City Bank of New York is not entitled to an

allotment of said sum of \$53,137.32, or to any other sum with respect to said flour, and that the entire amount realized by the assignee from the sale of said flour, less the expenses of the assignee, in the amount of \$10,000.00, should be distributed among the plaintiffs herein according to their holding of warehouse receipts calling for flour of the brands in question, and that subject to such re-adjustment, plaintiffs are willing to accept the said proposal of the defendant. This action was accordingly instituted by the plaintiffs against the defendant assignee, praying [19] that he be adjudged indebted to the plaintiffs severally in sums aggregating Mex. \$300,489.86, less expenses, and that the defendant be adjudged as holding said sum of \$300,489.86, less expenses, for the account of the plaintiffs, and that defendant be required and ordered to distribute the same proportionally among the plaintiffs in accordance with the principle of defendant's proposal for distribution herebefore referred to. The plaintiffs further asked for costs and for such further and other relief as to this Court may seem meet and proper.

The answer of the assignee admits all of the allegations contained in paragraphs one to eight inclusive of plaintiffs' complaint, but denies the allegations contained in paragraph nine of the complaint. The answer then alleges that the National City Bank of New York is the owner and holder of six certain godown warrants, or warehouse receipts, issued to said bank by the said American Overseas Warehouse Company, Inc., which collectively call



for the delivery of 161,000 bags of flour of various brands, and that said bank is therefore entitled to participate *pro rata* in the distribution referred to in the complaint and in accordance with the scheme of distribution proposed by the assignee of the funds in his hands as proceeds from the sale of 91,666 bags of flour. The plaintiffs in their reply deny that the National City Bank of New York is the holder of any godown warrants or documents of the American Overseas Warehouse Company entitled to rank with the warrants held by the plaintiffs, but admit that the National City Bank is the holder of certain documents bearing an endorsement of said Overseas Warehouse Company as follows: "We have received the goods mentioned in this instrument, and will hold the same to the order of the National City Bank of New York, and we hereby transfer all our rights under this instrument to the National City Bank of New York." Plaintiffs further deny that the goods referred to in said endorsement were ever received by the American Overseas Warehouse Company as therein alleged.

[20]

There is practically no dispute between the parties with respect to the facts in this case. It appears that the American Overseas Warehouse Company is a corporation organized under the laws of the State of Delaware, and for some time prior to the appointment of the assignee herein, was engaged in carrying on and conducting, among other things, a warehouse business in the city of Tientsin, China; that in its business dealings and transactions

said warehouse company was closely affiliated with a company known as the Union Trading Company, which last named company was engaged in conducting in said city of Tientsin the business of an exporter and importer on a rather extensive scale. It further appears that early in the month of July, 1927, the American Overseas Warehouse Company had outstanding godown warrants, or warehouse receipts, calling for the delivery of more than a million bags of flour of various brands. When, therefore, the plaintiffs in this action presented their godown warrants and demanded delivery of the flour supposed to be stored with the warehouse company, it was immediately ascertained that there had been a colossal failure, and that frauds of an astounding nature had been perpetrated upon those persons who had been doing a storage business with the warehouse company. It was ascertained that the warehouse company had in its godowns, or warehouses, only about 91,666 bags of flour of various brands, whereas it should have had, if its officers and agents had been conducting a legitimate and proper business, approximately 1,156,000 bags of flour. When, therefore, the assignee on the 1st day of August, 1927, took possession of the godowns and property of the warehouse company, he was confronted with the problem of returning to claimants all personal property which belonged to them, and to which the American Overseas Warehouse Company did not have title. The assignee found in the warehouses of the company only 91,666 bags of flour. These plaintiffs immediately presented

to him warehouse receipts, or godown warrants, calling for the delivery of 996,000 bags [21] of flour of various brands, and the National City Bank of New York presented to him six certain documents which the assignee has construed as standing upon the same footing as warehouse receipts, and under which the bank claimed that it was entitled to receive 161,000 bags of flour of various brands. By the consent of all parties concerned the 91,666 bags of flour were sold by the assignee for Mex. \$300,486.86, and he thereupon in the month of January, 1928, devised the plan referred to in the complaint for the distribution of such proceeds, less his expenses, to the various claimants holding godown receipts, which plan included the National City Bank of New York as one of the claimants. The only question presented in this case is whether the National City Bank of New York is entitled to participate in its proportionate share to these moneys in accordance with the plan proposed by the assignee.

(1) If the various instruments in writing held by the National City Bank, and under which it asserts title to 161,000 bags of flour in the godown of the Overseas Warehouse Company, were of the same character, or the legal equivalent, of the warehouse receipts held by the plaintiffs herein, there would manifestly be no controversy as to the right of the bank to participate along with these plaintiffs in the disposition and distribution of these funds by the assignee. It is the contention of counsel for the assignee in behalf of the bank, that while



these six instruments held by the bank, evidencing title to 161,000 bags of flour, are different in form from the warehouse receipts held by the plaintiff, that in legal effect they are the equivalent to warehouse receipts and must be construed as such by the Court in determining the right of the bank to participate in the distribution of the funds. It therefore becomes necessary to examine somewhat closely and critically the precise nature of the transaction by which the bank became invested with title to certain bags of flour supposed to have been deposited in the godowns of the [22] Overseas Warehouse Company. One transaction will serve to illustrate five of the transactions involving 141,000 bags of flour to which the bank claims title. The sixth transaction, being the one of April 8, 1927 (Defendant's Ex. 2), will be considered separately.

It appears from Defendant's Ex. 1 that on the 5th day of April, 1927, the Union Trading Corporation executed and delivered to the American Overseas Warehouse Company, Inc., its promissory note for Tientsin Tls.80,000.00 for value received, with interest at the rate of 10% per annum payable on demand at the National City Bank of New York at Tientsin, China. It further appears that simultaneously with the execution and delivery of said promissory note, that the Union Trading Corporation deposited with the Overseas Warehouse Company, as collateral security for the payment of said note, the following described personal property:

10,000 bags (net 49 lbs. each) Shanghai	
Flour @ \$3.60.....	\$ 36,000
35,000 bags (net 49 lbs. each) Egyptian	
Flour @ 3.60.....	\$126,000
60 bales Gunny Bags 100 bags each @ .60..	\$ 14,400
	<hr/>
Total.....	\$176,400

On the back of this promissory note, Ex. 1 appears the following endorsement by the General Manager of the Overseas Warehouse Company:

“We have received the goods mentioned in this instrument and will hold same to the order of the National City Bank of New York and we hereby transfer all our rights under this instrument to the National City Bank of New York.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Signed) C. H. CORNISH,  
General Manager.”

The foregoing is the transaction under which the National City Bank of New York claims to be the owner, or entitled to the possession as pledgee, of 45,000 bags of flour of the brands above described, alleged to have been delivered by the Union Trading Corporation to the Overseas Warehouse Company on the 8th day of April, 1927, as collateral security for the payment of said promissory note. Our inquiry now is as to whether such transaction operated as a matter of [23] law to give to the National City Bank the “status” of a holder of a warehouse receipt from the Overseas Warehouse Company, so as to enable the bank to participate in

the proposed allocation of the funds now in the hands of the assignee.

It is elementary law that every contract by which the possession of personal property is transferred as security only is to be deemed a pledge.

Irwin vs. McDowell, 34 Pac. 708.

Waldie vs. Dol, 29 Cal. 555.

Belden vs. Perkins, 78 Ill. 449.

Neguiar vs. Thomas, 42 S. W. 846.

Beacon Trust Co. vs. Robbins, 173 Mass. 261;  
53 N. E. 868.

Barber v. Hathaway, 169 N. Y. 575, 61 N. E.  
1127.

Hinsdale vs. Jerman, 115 N. C. 152,

Providence Thread Co. vs. Aldrich, 12 R. I.  
77.

Hudson vs. Wilkinson, 45 Tex. 444.

Taggart vs. Packard, 39 Vt. 628.

Parkesburg 1st Nat. Bank vs. Harkness, 42  
W. Va. 156; 24 S. E. 548.

Herrman vs. Central Car Trust Co., 101 Fed.  
41; 41 C. C. A. 176.

Conceding that these 45,000 bags of flour were deposited by the Union Trading Corporation with the Overseas Warehouse Company on the 5th day of April, 1927, as collateral security for the payment of the note, it is clear beyond all controversy that these identical bags of flour must have been received by the warehouse company as a pledge, to be held by it as security for the payment of the note.

When, therefore, the warehouse company assigned the note and transferred all its rights thereto to the National City Bank, the National City Bank merely stepped into the shoes of the warehouse company. The only difference being that the bank did not have manual possession of the 45,000 bags of flour which had been pledged by the Union Trading Company to secure the payment of the note, but the bank did have *construction* possession and effective control of this pledged property under and by virtue of the undertaking of the warehouse company to hold the same to the order of the National City Bank. In other words, at the time of the failure of the Overseas Warehouse Company, and when the assignee took possession of all of its property on the 1st of August, 1927, the National City Bank was the owner [24] of a promissory note for Tls.80,000.00, which was made and executed by the Union Trading Company on the 8th day of April, 1927. The bank was likewise entitled to take possession at any time of the 10,000 bags of Shanghai flour and the 35,000 bags of Egyptian flour which the Overseas Warehouse Company had received as a pledge and collateral security for the payment of a note, and which after the assignment of the note to the bank, the Overseas Warehouse Company was supposed to be holding as bailee to the order of the bank.

Now it seems to me very clear that in such a situation the bank was not entitled to receive from the Warehouse Company any other property, or any other bags of flour than those which the Warehouse Company had received as a pledge, and which it had

agreed to hold to the order of the bank. Certainly neither the bank nor the Overseas Warehouse Company had the right to appropriate the flour, or any part thereof, that had been stored with the Warehouse Company by the holders of these warehouse receipts in order to make good any misappropriation or loss of such pledged property. The determination of the rights of these parties under their respective muniments of title, comes down, in my opinion, largely to a matter of proof. If the bank were able to show, by a preponderance of the evidence, that these 45,000 bags of flour, of Shanghai and Egyptian brands, and which had been received by the Warehouse Company as a pledge, were still in the warehouse or godown of the company, having been specially set aside and ear-marked as the property of the Union Trading Company, then I take it that the bank would be entitled to the possession of such property, even though there was not another bag of flour in the godown or warehouse which could be appropriated for the benefit of these plaintiffs as holders of godown warrants. But the difficulty, with respect to the claim of the bank, is that no flour was found upon the premises specially ear-marked or set aside as the [25] property of the bank, or as the property of the Union Trading Company, and it may very well have been, in view of the misappropriation by the Warehouse Company of more than a million bags of flour, that the "pledged flour," in which only the bank had an interest, was entirely misappropriated by someone connected



with the Warehouse Company. However that may be, as I view the case it was necessary for the bank to prove by competent evidence that the flour which it claimed as a pledge and as security for the payment of its note, was in the possession of the assignee at the time he took over the 91,666 bags of flour of various brands on the 1st of August, 1927.

Counsel for both parties have filed elaborate and interesting briefs for the benefit of the court, and many questions of law have been exhaustively discussed, all of which have some bearing upon the question here under consideration. I have not deemed it necessary to go into those questions in this opinion, for the simple reason that in their last analysis they all come down to the question as to whether the National City Bank is the holder of evidences of title to this flour which are in legal effect the equivalent of warehouse receipts. I have no difficulty in reaching the conclusion that five of the transactions, all of which are similar to the one illustrated by Ex. 1, do not as a matter of law place the bank in the position of a holder of warehouse receipts.

(2) Defendant's Ex. 2 is a promissory note for Tls.30,000.00, dated April 8, 1927, signed by the Union Trading Corporation, and made payable to the order of the American Overseas Warehouse Company. It is in all respects identical with Plaintiff's Ex. 1, except as to the amount and character of the collateral security deposited with the Warehouse Company to secure the payment of the



note. In this instance 10,000 bags of Green Battleship (brand) flour of the value of \$34,000.00 and 10,000 bags of Red Battleship [26] (brand) flour of the value of \$34,000.00 is the quantity and description of the property pledged. This note, together with all the rights of the Overseas Warehouse Company thereto, was assigned and transferred on the 8th day of April, 1927, to the National City Bank, and the Warehouse Company in its endorsement on the note acknowledged that the bags of flour therein described had been received by it in good condition, and that the Warehouse Company would hold the same to the order of the National City Bank of New York. It further appears, however, that thereafter, and on the same day, the National City Bank of New York obtained from the American Overseas Warehouse Company a godown warrant for these identical 20,000 bags of flour in the precise form of the godown warrants held by the plaintiffs herein. In such godown warrant, which is in evidence as Godown Warrant No. 3621, there is contained among other things the following recitals:

“Received the undermentioned goods in apparent good condition to be stored for account of National City Bank of New York.

Ten Thousand (10,000) Bags Green Battleship  
Brand Flour,

Ten Thousand (10,000) Bags Red Battleship Brand  
Flour.

This warrant covers insurance against Loss on

damage by Fire or Lightning subject to the ordinary conditions of fire insurance.

The declared value of this warrant on the above mentioned goods is M\$68,000.00, but in case of fire, the damage will be paid not exceeding the market value immediately anterior to the fire.

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

(Signed) WILLIAM P. HUNT,  
Acting Manager."

It is the contention of counsel for the plaintiffs that the bank is not entitled to participate in the funds now in the hands of the assignee under this godown warrant for these 20,000 bags of flour, for the following reasons:

A. It is asserted that this godown warrant, No. 3621, was issued to secure the private indebtedness of the Warehouse Company, and therefore cannot be regarded as valid. (Plaintiff's Brief—page 15.)

B. It is further contended that this godown warrant, No. 3621, merely accompanied and supported the document of pledge from the Union Trading Corporation to the Warehouse Company, the benefit of which had been endorsed [27] over to the National City Bank of New York, and it is asserted that the accompanying godown warrant was accepted by the National City Bank with full notice of the capacity in which the Warehouse Company assigned its interests, and that therefore this godown warrant in the hands of the National City

Bank of New York can have no greater value than the legal relationship between the several parties attached to the main documents warranted. (Plaintiff's Brief—page 15.)

I am not at all impressed by this argument and reasoning, and I must confess that I have been unable to see the logic or force of such contentions. I can see no good reason for denying to the National City Bank the right to deposit these 20,000 bags of flour with the Overseas Warehouse Company and take from said Company a godown receipt for the same which I conceive to be the legal effect of the transaction. It is true that the Union Trading Corporation deposited with the Overseas Warehouse Company these 20,000 bags of flour as a pledge to secure the payment of its promissory note of Tls.30,000.00. But the 20,000 bags of flour so deposited as a pledge with the Warehouse Company were subsequently transferred and turned over to the National City Bank when the Bank took an assignment from the Warehouse Company, for a valuable consideration of the promissory note, for Tls.30,000.00, which had been issued by the Union Trading Corporation. It is quite clear to my mind that after such assignment of the note to the Bank together with the pledged property, the Overseas Warehouse Company was eliminated from the picture except that it still remained as bailee of the Bank. The National City Bank thereupon held the note of the Union Trading Corporation, and at the same time had received all the interest in the pledged property consisting of 20,000 bags of flour,

which the Warehouse Company had acquired from the Union Trading Corporation. It is true that the Bank left this pledged property, which was to be held by the Warehouse Company to the Bank's order, in the actual possession of the Warehouse Company. In such a situation, it seems to me that the National City Bank had such a present interest [28] in this pledged flour of 20,000 bags as to entitle the Bank to deposit the same with the Warehouse Company for storage, and to take a godown receipt therefor, instead of leaving it in the possession of the Warehouse Company as pledged property to be delivered to the Bank upon its order. I therefore conclude that the taking of this godown receipt by the Bank from the Overseas Warehouse Company for these 20,000 bags of flour, operated to place the Bank, so far as this particular property was concerned, in the "status" of a *bona fide* holder of a warehouse receipt. Whether the Bank violated its contract with the Union Trading Company, the pledgor, in so doing, is in my judgment quite beside the question. The fact remained that the National City Bank had control and was at all times after the assignment to it of the note, entitled to the possession of these 20,000 bags of flour, and if it elected to place those 20,000 bags of flour in storage with the Overseas Warehouse Company under a warehouse receipt, and did so as a matter of fact, the Bank is now entitled to make claim under its godown warrant.

(3) There is one other matter which in my judgment deserves some special consideration in con-

nection with this claim of the Bank under its godown warrant No. 3621. It will be observed that this godown warrant calls for the delivery of 10,000 bags of "Green Battleship" flour, and 10,000 bags of "Red Battleship" flour. An inspection of the assignee's proposed scheme of distribution fails to disclose that he took possession of any flour of the brand described as "Red Battleship." If there were no bags of flour of the brand described as "Red Battleship" in the godown at the time the assignee took over the property, it would seem that neither the Bank nor any of the plaintiffs holding godown warrants for "Red Battleship" flour would be entitled to participate under their "Red Battleship" receipts as tenants in common in the proceeds in the hands of the assignee derived from [29] the sale of other and different brands of flour. The rule of law to be applied in such cases is clearly and forcibly stated by the Circuit Court of Appeals of the Sixth Circuit in the case of *Interstate Banking & Trust Co. vs. Brown*, 235 Fed. 32, 39, as follows:

"We do not find that this section has been construed by other decisions in a way here helpful, and we must, without such aid, determine its force as applied to the present case. It seems a proper summary of text-book definitions, as modified by this section, to say that fungible goods are those of which each unit is fully equivalent to each other unit; that this equivalency may be inherent or may result



from agreement; and that such agreement may be express or may be implied from custom. Further, it seems obvious that goods may be of one of three classes: Inherently fungible, or capable of acquiring that quality by agreement, or quite incapable thereof. Bushels of wheat of the same grade are necessarily the equivalent of each other; barrels of flour may or may not have that mutual relationship—presumptively, they do not (Jones on Collateral Securities, sections 317, 318)—though the interested parties may intelligibly consent that flour shall be so considered; but that there should be any express agreement or any contract-raising custom whereby a bolt of cloth and a case of boots and shoes should be treated as equivalent to each other is beyond comprehension. We take it, the statute, section 23, must mean only that the right of the warehouseman to mix articles so as to lose their identity and his right to deliver on a receipt, not the thing which he received but other equivalents, are to be confined to the first two classes of articles above mentioned, viz., those inherently equivalent to each other, and those which may be so, and which, therefore, can rightfully be thought of as subject to an agreement or a custom to that effect, but that these rights do not extend to articles where mutual equivalency is inherently impossible. To use the foregoing illustration we cannot comprehend an agreement or custom which would authorize a warehouseman to deliver



boots and shoes in satisfaction of his receipt for cloth."

It may be that a number of bags of "Red Battleship" flour were taken over by the assignee and listed by him under the denomination of "Plain," "Mixed," or "Red Castle" brands, in which event the proposed plan and distribution would seem to be in accordance with the law. I merely put forth the suggestion that only bags of flour of the same size and brand (the quality being presumably the same) can be regarded as fungible property, and that only warrant holders of flour of the same brand are entitled to [30] participate as tenants in common in the proceeds from the sale of the flour of that particular brand. I note also that the godown warrant which is attached to the complaint as Plaintiff's Ex. "B," and dated June 3, 1927, calls for the delivery from the godown company to the Bank of China of 15,000 bags of "Pyramid Flour." It will be observed that the assignee's proposed plan for distribution makes no mention of a brand of "Pyramid Flour," and unless "Pyramid Flour," as described in the godown warrant Ex. "B," is the same and identical with Egyptian Flour, which the assignee lists as a brand of flour which he took over, the Bank of China would not be entitled to participate in the proceeds from the sale of Egyptian Flour under a warrant showing that it had stored

a flour of entirely different brand, to wit, Pyramid Flour. These observations are, in my opinion, not only pertinent, but should be observed in ascertaining what amount each holder of godown warrants for flour should be entitled to receive and participate in, with respect to the proceeds from each particular brand of flour which may have been taken over and sold by the assignee.

It may be that the principles of law hereinbefore referred to as governing the rights of parties to participate in the allotment and distribution of fungible goods cannot be applied by the assignee in this case with complete accuracy, for the reason that he is attempting to distribute a particular fund instead of the property itself. It will be remembered that the flour was sold by the assignee with the consent of all the parties claiming an interest therein. If the flour had been sold by the assignee in lots of the various brands found in the warehouse and a separate account of such sales and of the proceeds therefrom kept by him, allotments to the various claimants might have been made in accordance with the principles enunciated in "Interstate Banking & Trust Co. vs. Brown," *supra*. But it may be that the assignee sold the flour in a lump sum or in lots made up of various brands of flour and of various amounts, in which case it [31] would be difficult, if not impossible, to make allotments to the various claimants of the monies so received in accordance with the principles of law hereinbefore discussed.

Such difficulties would, however, not affect a case in which a claimant held a godown receipt for a particular brand of flour, which was not found by the assignee to be in the godown when he took it over, and which did not contribute to the fund in which the holder of the godown warrant was seeking to participate. A simple illustration will, I think, make this clear.

Let us suppose that the National City Bank of New York held a godown warrant of the Overseas Warehouse Company calling for the delivery of 95,000 bags of flour of the brand of "Pillsbury's Best." If no flour of such brand was in the godown of the warehouse company when the assignee in this case took over 91,666 bags of flour of the various brands mentioned, and thereafter sold same, I take it as being too clear for argument that the National City Bank, under its godown warrant calling for 95,000 bags of "Pillsbury's Best," would not be entitled to participate in the proceeds derived from the sale of such other brands of flour, or in any part thereof. On the other hand, if the assignee had found 91,666 bags of flour of the brand of "Pillsbury's Best," for which the National City Bank held a godown warrant calling for the delivery of 95,000 bags of flour of the brand of "Pillsbury's Best," then and in such case it would be equally clear that these plaintiffs would not be entitled to participate in any part of the proceeds derived from the sale of the flour of the "Pillsbury" brand, but the entire proceeds therefrom would go to the Bank.

The assignee has allowed the National City Bank of New York, in his proposed scheme of distribution, the sum of Mex. \$53,137.32, as and for its proportionate share of the funds under the Bank's claim to 161,000 bags of flour of various brands. I have heretofore held, in the first part of this opinion, that such claim on the part of the [32] Bank must be rejected to the extent of 141,000 bags of flour, on the ground that its documents of alleged title thereto were not the legal equivalent of godown receipts, but in the latter part of this opinion I have held that the Bank's claim for the return of 20,000 bags of flour under its godown receipt No. 3621 is valid if the 10,000 bags of "Red Battleship" flour were received by the assignee, and that the Bank is entitled to participate in the distribution and allocation of these funds to that extent. It follows from these findings and conclusions of law heretofore expressed, that the National City Bank is only entitled to have and receive from the assignee 20/161 of Mex. \$53,137.32, or the sum of \$6,600.90, and that the balance of the \$53,137.32, less said sum of \$6,600.90, should be readjusted and allocated among the various plaintiffs herein as their interests may appear. In the event that the assignee did not receive any flour of the "Red Battleship" brand, then the Bank's allotment should be reduced from \$6,600.90 to \$3,300.45.

It is accordingly ordered, adjudged and decreed that the defendant revise and readjust his proposal

for the distribution of the proceeds in his hands from the sale of the flour, in accordance with this opinion, allotting to the National City Bank of New York \$6,600.90, or \$3,300.45 in the event that no flour of "Red Battleship" brand was taken over by the assignee, and increasing the allotments to the plaintiffs herein, as their interests may appear, and thereupon defendant is ordered to pay and distribute the same when so reallocated, to the several plaintiffs and to the National City Bank upon receiving their receipts therefor. Costs will not be awarded to either party.

MILTON D. PURDY,  
Judge.

Dated this 16th day of July, 1928. [33]

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Cause No. 3067—Civil No. 1293. Motion for a New Trial. Filed at Shanghai, China, July 24, 1928. (Sgd.) L. T. Kenake, Asst. Clerk.

[Title of Court and Cause.]

#### MOTION FOR A NEW TRIAL.

Now comes the defendant in the above-entitled action and through his undersigned attorneys respectfully moves this Court for a new trial herein for the following reasons and on the following grounds:

1. That the Court erred in holding and deciding that the relations existing between the American Overseas Warehouse Company, Inc., and the Na-



tional City Bank of New York was that of pledgor and pledgee.

2. That the Court erred in holding and deciding that the National City Bank of New York, having left with the American Overseas Warehouse Company as bailee certain fungible merchandise, was entitled to receive that particular merchandise only and that after a commingling of such particular merchandise with other merchandise of a like kind, the said National City Bank of New York could not participate *pro rata* in the commingled property. [34]

3. That the Court erred in holding and deciding that the National City Bank of New York could not successfully claim any merchandise of a fungible nature left by it with the American Overseas Warehouse Company as bailee, without proving by competent evidence that the actual merchandise so left with the said American Overseas Warehouse Company was in the possession of the assignee of that company at the time he took over as such assignee.

4. That the Court erred in holding and deciding that all of the transactions between the American Overseas Warehouse Company and the National City Bank of New York similar to the one illustrated by Exhibit 1, do not as a matter of law place the National City Bank of New York in the position of a holder of a warehouse receipt.

5. That the decision and judgment of the Court is contrary to law.



Dated: Shanghai, China, July 24, 1928.

FLEMING, FRANKLIN & ALLMAN.

By C. S. FRANKLIN,  
Attorneys for Defendant.

To the Clerk U. S. Court for China and to Messrs.  
Kent & Mounsey, Attorneys for the Plaintiffs.

You will please take notice that the foregoing motion will be presented to the Honorable Milton D. Purdy, Judge of the above-entitled court, at ten o'clock A. M., on Monday, August 27, 1928, or as soon thereafter as counsel may be heard.

FLEMING, FRANKLIN & ALLMAN.

By C. S. FRANKLIN,  
Attorneys for Defendant. [35]

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Cause No. 3067—Civil No. 1293. Bill of Exceptions. Filed at Shanghai, China, September 8, 1928. James M. Howes, Clerk.

[Title of Court and Cause.]

#### BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 25th day of May, 1928, the above-entitled cause came on for hearing at Tientsin, China, before the Honorable Milton D. Purdy, Judge of the United States Court for China; the plaintiffs appearing by P. H. B. Kent, Esq., of Messrs. Kent & Mounsey, and Mr. H. Bonnafous, their attorneys, and the defendant appearing by Cornell S. Franklin, Esq., of Messrs.

Fleming, Franklin & Allman, his attorneys, and the following proceedings took place:

. . . . .

Judge Franklin offers Exhibit 1 and it is agreed by Mr. Kent that it is one of the six godown warrants upon which the National City Bank claims and typical of the remaining five.

Defendant's Exhibit 1 received without objection.

Counsel for defendant offers Defendant's Exhibit 2.

Defendant's Exhibit 2 received without objection.

Counsel for defendant offers Defendant's Exhibit 3.

Defendant's Exhibit 3 received without objection.

Counsel for defendant states it is admitted receipts call for total of 161,000 bags of flour, that the figures shown [36] on the proposed distribution scheme are correct.

Counsel for defendant—execution of Defendant's Exhibit 3 by Mr. Cornish, general manager of the American Overseas Warehouse Company, is admitted.

Mr. Kent argues.

Counsel for defendant serves notice that he will also show that the bags of flour called for by their godown warrants were never actually in the godown. Therefore, they hold godown warrants on something that did not exist.

. . . . .

TESTIMONY OF R. T. McDONNELL, FOR  
PLAINTIFFS.

(Questions by Mr. KENT to Mr. McDONNELL.)

Q. You are the assignee of the defendant in this action? A. Yes.

Q. The warehouse business was incorporated for carrying on the business of warehousemen?

A. Yes.

Q. When you took over the godown how was the flour stored? A. It was stored in bulk.

COURT.—Q. In bulk?

A. In bags.

Q. Distinguished bags? A. Yes.

Q. In this case the only distinction was brands?

A. Yes, that is all.

Q. Was there anything to distinguish the parcels of any particular brand? A. Nothing.

Q. Were there any names of any banks or other persons to indicate ownership? A. None. [37—2]

Q. Was there any indication that any of the flour belonged to the warehouse company?

A. None.

COURT.—Q. No indication that any of the flour belonged to any particular bank? A. No.

Q. When you took over the books of the warehouse company did you take over the godown books? A. What was left.

(Testimony of R. T. McDonnell.)

Q. Were they in Chinese? A. Yes.

Q. Did you have them translated?

A. I had what I thought was the principal one, that was the godown keeper's tally-book.

Q. Now, the National City Bank are interested or claim to be interested, I think, in four brands of flour? A. Yes.

Q. Could you mention what these were?

A. Green Battleship, Lotus, Egyptian and Shanghai brand.

Q. Have you examined at my request the tabulated statement in regard to these various transactions? A. With the National City Bank?

Q. Yes. A. Yes.

Q. Have you checked the figures with your own godown accounts? A. Yes.

Q. And with your records as regards godown warrants? A. Yes.

Q. And in effect so far as you know, this tabulated statement is correct? A. Yes. [38—3]

Q. In regard to the Green Battleship in the godown on December 31, 1926, there were 14,000 bags and 24,000 bags received between January 1st and April 8th?

A. There were issued out 24,000 between those dates. Therefore, there were 14,000 in the godown as of that date, April 8th, which were subject to two godown warrants, March 8, 10,000 bags held by China & South Sea Bank and March 18th. This godown warrant for 30,000 bags is the result of that statement. There was no free flour which

(Testimony of R. T. McDonnell.)

could have been placed in godown on April 8, 1927, of this particular brand. On March 8th there had been 10,000 bags which remained subject to godown warrant.

Objection by counsel for defendant—this witness does not appear to know whether that godown warrant of March 8th referred to these particular bags or not.

Q. Mr. McDonnell, did you on this particular statement, the first statement, page 1, on Exhibit "E," form a conclusion that on April 8th there was no free flour?

Objection by counsel for defendant. Objection sustained.

Q. Do you recognize Exhibit "E" as being the tabulated statement which you have checked with the godown man's books and with your records of the warrants and of the transactions with the National City Bank? A. Yes.

Plaintiff's Exhibit "E" offered in evidence.

Objection by counsel for defendant—it does not appear to show all of the godown warrants of the plaintiffs and the National City Bank.

Q. This first statement in regard to the Green Battleship brand is that a complete statement of the transaction in regard to that brand as between the 31st of December, 1926, and April 8, 1927? No godown warrants omitted or anything of that sort? A. Yes.

(Testimony of R. T. McDonnell.)

Q. It is a complete statement? A. Yes. [39—4]

(Question by Judge FRANKLIN.)

Q. Does it show all of the godown warrants upon which the plaintiffs in this case rely?

A. I think in this particular instance it has to do with godown warrants issued on Green Battleship brand.

Q. Does it show all of the godown warrants upon which the plaintiffs rely having to do with Green Battleship brand? A. During this period, yes.

Q. During what period?

A. Period from January 1st to April 8th, 1927.

Q. Do you know why that particular period was shown?

A. No, except they wanted to utilize this first transaction of the National City Bank.

COURT.—Q. There wasn't anything on there that shows the first transaction between the warehouse company and the National City Bank, 10,000, is that in the books, the first transaction?

A. No.

Q. There is nothing in the books to that effect, is there? There is not any entry in the books of the Overseas Warehouse Company showing this is the first transaction between the warehouse and the National City Bank, April 8, 1927, 10,000 bags?

A. No.

Q. That? A. Yes.

Q. And you just assumed that that is the first



(Testimony of R. T. McDonnell.)

transaction, you do not know that that is in the books, do you?     A. No.

. . . . .  
(Questions by Mr. KENT.)

Q. The whole of this Exhibit "E," all these figures have been checked over by you? [40—5]

A. Yes.

Q. And they are correct?     A. Yes.

Objection by counsel for defendant—conclusion of this witness as to whether they are correct or not.

Q. The books of which this record is a translation, are they still in your possession?     A. Yes.

Q. Have they always been in your possession since you were appointed assignee?     A. Yes.

Q. This Exhibit "E" includes four statements, one in regard to Battleship brand, one in regard to Lotus brand, one in regard to Egyptian brand and one in regard to Shanghai brand?

A. That is right.

Q. And those were the four brands in which the National City Bank was interested?     A. Yes.

Q. Have you seen the documents in the National City Bank on which they rely?     A. Yes.

Q. Are the dates of the various transactions at the right of these several notes correct?     A. Yes.

Q. Are they the correct amounts?     A. Yes.

Q. Are all the transactions enumerated in this Exhibit "E" National City Bank transactions?

A. Yes, in respect to flour.

(Testimony of R. T. McDonnell.)

Q. Is the godown man available in Tientsin as far as you know?

A. I think it is possible to get hold of him, but I am not sure.

Q. When you took over as assignee did you see the godown man?     A. Yes.

Q. Did you go through his books with him, discuss the matter and [41—6] check these items up as far as possible?

A. It was extremely difficult to get anything from him because he has been under police surveillance from the period of 9th of July until I took over, the first of August, and then I kept him there for another week and he was quite frightened and it was almost impossible to divulge any information, and I took these books from him and got the information. This godown keeper's book was the exact tally as he made it of flour that went in the godown and went out of the godown without any reference to warrants issued.

(Questions by Judge FRANKLIN.)

Q. Do you know whether you received from this godown keeper all his books or not?

A. I am sure I did not.

Q. You are sure you did not?     A. Yes.

Q. Have you any way of knowing whether his books are correct or not?

A. Except when we did check total amount of flour in the godown.

Q. That was your only way of testing your correctness?     A. Yes.

(Testimony of R. T. McDonnell.)

COURT.—Q. What do you mean by total amount of flour in the godown?

A. I took over and checked with the godown, checked with the bookkeeper's book.

Q. That is the only way you had of testing his records? A. That is all.

Q. Do you know whether he kept this record himself or not?

A. I do not believe he did. I think he had a writer in his office.

Q. This statement which has been marked Exhibit "E" does all of the merchandise on this Exhibit appear in the books, on April 14th there was no free flour available, does that appear?

A. No. [42—7]

Q. In his books does it appear that godown warrant No. 3928 was held by the National City Bank for 12,000 bags? Does that appear in the godown keeper's books? A. Not at all; no.

Q. You stated, I believe, that there is no relation between the godown keeper's books and the godown warrants issued to the plaintiffs and the National City Bank?

A. I believe there is no relation.

Counsel for defendant objects on several grounds—no foundation laid—does not purport to be even a correct copy of the godown keeper's books or summary. It includes statements gathered from the brain of my friend

Attorneys to stipulate to pay over to plaintiffs amounts not in dispute, keeping out sufficient to cover judgment.

. . . . .

This case was brought up in the United States Court for China at Shanghai, China, Monday, August 27, 1928, upon motion for new trial filed by counsel for defendant.

Argument by Judge Franklin, answered by *L. H. Kent, Esq.*

Motion denied by Court.

Exception noted by Judge Franklin.

Judge Franklin makes oral motion for stay of execution for a period of two weeks.

Motion granted by Court. [44—9]

I, Louise M. Porter, Official Reporter of the United States Court for China, do hereby certify that the above and foregoing transcript, numbered pages 1 to 9, inclusive, contain all the testimony offered in the above-entitled matter, together with the objections of counsel and the rulings thereon by the Court.

(Sgd.) LOUISE M. PORTER,  
Official Reporter, United States Court for China.

And now on this 8th day of September, 1928, the defendant presents this bill of exceptions, containing all of the evidence received upon the trial of this action or relating to the foregoing exceptions,

and prays that the same be allowed, signed, sealed and made a part of the record herein.

FLEMING, FRANKLIN & ALLMAN.

By C. S. FRANKLIN,

Attorneys for Defendant.

The foregoing bill of exceptions is hereby approved, allowed, settled and made a part of the record herein.

Shanghai, September 8, 1928.

MILTON D. PURDY,

Judge, United States Court for China. [45—10]

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Cause No. 3067—Civil No. 1293. Petition for Appeal. Filed at Shanghai, China, September 8, 1928. James M. Howes, Clerk.

[Title of Court and Cause.]

#### PETITION FOR APPEAL.

Now comes the defendant above named by Fleming, Franklin & Allman, his attorneys, and conceiving himself aggrieved by the decision and judgment of the above-entitled court entered on the 16th day of July, 1928, in the above-entitled cause, does hereby appeal from said decision and judgment to the United States Circuit Court of Appeals for the Ninth Circuit and he prays that this his appeal may be allowed and that a transcript of the record and proceedings and papers upon which said decision and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals

for the Ninth Circuit. Dated at Shanghai, China, this 8th day of September, 1928.

FLEMING, FRANKLIN & ALLMAN.

By C. S. FRANKLIN,  
Attorneys for Defendant. [46]

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Cause No. 3067—Civil No. 1293. Assignment of Errors. Filed at Shanghai, China, September 8, 1928. James M. Howes, Clerk.

[Title of Court and Cause.]

#### ASSIGNMENT OF ERRORS.

Now comes the defendant above named by Fleming, Franklin & Allman, his attorneys, and hereby specifies the following as errors upon which he will rely in his appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause.

1. That the United States Court for China erred in holding and deciding that the relations existing between the American Overseas Warehouse Company, Inc., and the National City Bank of New York was that of pledgor and pledgee. (Decision and Judgment, pages 6 to 9, inclusive.)

2. That the United States Court for China erred in holding and deciding that the National City Bank of New York, having left with the American Overseas Warehouse Company, Inc., as bailee, certain fungible merchandise, was entitled to receive that particular merchandise only and that after a com-



mingling of such particular merchandise with other merchandise of a like [47] kind, the said National City Bank of New York could not participate *pro rata* in the commingled property.

3. That the United States Court for China erred in holding and deciding that the National City Bank of New York could not successfully claim any merchandise of a fungible nature left by it with the American Overseas Warehouse Company as bailee, without proving by competent evidence that the actual merchandise so left with the said American Overseas Warehouse Company was in the possession of the assignee of that Company at the time he took over as such assignee.

4. That the United States Court for China erred in holding and deciding that all of the transactions between the American Overseas Warehouse Company and the National City Bank of New York similar to the one illustrated by Exhibit 1, do not as a matter of law, place the National City Bank of New York in the position of a holder of a warehouse receipt.

5. That the United States Court for China erred in ordering the defendant to revise and re-adjust his proposal for the distribution of the proceeds in his hands from the sale of the flour found in the warehouses of the American Overseas Warehouse Company, Inc., when the same were taken possession of by the defendant as assignee.

6. That the United States Court for China erred in ordering the defendant not to recognize the claim of the National City Bank of New York as

being entitled to participate *pro rata* in the proceeds from the sale of said flour with the plaintiffs.

7. That the United States Court for China erred in not approving the scheme of distribution proposed by the defendant.

8. That the United States Court for China erred in denying defendant's motion for a new trial. [48]

WHEREFORE the said defendant prays that the decision and judgment of the United States Court for China dated the 16th day of July, 1928, be reversed and that the United States Court for China be directed to order distribution of the funds in defendant's hands in accordance with the defendant's proposed scheme of distribution or in the alternative that said judgment be reversed and the United States Court for China be directed to grant a new trial of the said cause.

Dated at Shanghai, China, September 8th, 1928.

FLEMING, FRANKLIN & ALLMAN.

By C. S. FRANKLIN,

Attorneys for Appellant (Defendant in the Above-entitled Cause). [49]

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Cause No. 3067—Civil No. 1293. Order Allow-  
ing Appeal and Fixing Amount of Bond. Filed at  
Shanghai, China, Oct. 25, 1928. James M. Howes,  
Clerk.

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING  
AMOUNT OF BOND.

The petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decision and judgment in the above-entitled cause entered the 16th day of July, 1928, of the defendant above named having been presented to the Court, after due consideration of the same.

IT IS ORDERED that said appeal be allowed as prayed for and that the amount of cost and supersedeas bond on said appeal be and hereby is fixed in the sum of Mex. \$60,000.00 conditioned as required by law and rule of this Court.

Dated at Shanghai, China, this 25th day of October, 1928.

MILTON D. PURDY,

Judge, United States Court for China. [50]

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Cause No. 3067—Civil No. 1293. Bond on Appeal. Filed at Shanghai, China. Oct. 25, 1928. (Sgd.) James M. Howes, Clerk.

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, R. T. McDonnell, Assignee American Overseas Warehouse Company, Incorporated, as principal, and International Banking Corporation,

as surety, are held and firmly bound unto the above-named Bank of China, Bank of Communications, Exchange Bank of China, China & South Sea Bank, Agricultural and Industrial Bank of China, Chinese American Bank of Commerce, Chung Yuan Industrial Bank, National Commercial Bank, Ltd., Bank of Agriculture & Commerce, Banque Franco-Chinoise and Shih Fu Sheng, hereinafter called "the appellees," in the sum of Seventy Thousand Dollars, local silver currency (Y\$70000), to be paid to the said appellees, their successors or assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30 day of September, 1928.

WHEREAS the above-named R. T. McDonnell, Assignee American Overseas Warehouse Company, Incorporated, is prosecuting an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above-entitled suit by the Judge of the United States Court for China,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named R. T. McDonnell, Assignee American Overseas Warehouse Company, Incorporated, shall prosecute said appeal to effect, and if he fail to make said appeal good shall pay the judgment rendered by the United States Court for China on the 16th day of July, 1928, and answer all damages and costs, then this obligation

shall be void, otherwise the same shall be and remain in full force and virtue.

Dated at Tientsin, China, this 30 day of September, 1928.

(Sgd.) R. T. McDONNELL,  
Assignee AMERICAN OVERSEAS WARE-  
HOUSE COMPANY INCORPORATED.

For the International Banking Corporation.

(Sgd.) \_\_\_\_\_,  
Manager.

Approved.

(Sgd.) MILTON D. PURDY,  
Judge, United States Court for China.

Approved by counsel for plaintiffs.

(Sgd.) P. H. B. KENT.  
(KENT & MOUNSEY.) [51]

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Cause No. 3067—Civil No. 1293. Citation on Appeal. Filed at Shanghai, China, Oct. 25, 1928. James M. Howes, Clerk.

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

To the Bank of China, Bank of Communications, Exchange Bank of China, China & South Sea Bank, Agricultural and Industrial Bank of China, Chinese American Bank of Commerce, Chung Yuan Industrial Bank, National Com-

mercial Bank Limited, Bank of Agriculture & Commerce, Banque Franco-Chinoise, and Shih Fu Sheng, GREETING:

You and each of you are hereby cited and admonished to be and appear at the next session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be held in the City of San Francisco, State of California, within sixty days from the date of service hereof pursuant to an appeal filed in the office of the Clerk of the United States Court for China, wherein R. T. McDonnell is appellant and the Bank of China, Bank [52] of Communications, Exchange Bank of China, China & South Sea Bank, Agricultural and Industrial Bank of China, Chinese-American Bank of Commerce, Chung Yuan Industrial Bank, National Commercial Bank Limited, Bank of Agriculture & Commerce, Banque Franco-Chinoise and Shih Fu Sheng are appellees, to show cause, if any there be, why the judgment rendered against the said appellant in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties on that behalf.

WITNESS the Honorable MILTON D. PURDY, Judge of the United States Court for China, this 25th day of October, 1928.

MILTON D. PURDY,

Judge, United States Court for China.

We hereby this 6th day of November, 1928, accept



due personal service of this citation on behalf of the appellees.

(Signed) P. H. B. KENT,  
(KENT & MOUNSEY),  
Attorney; for Appellees. [53]

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Cause No. 3067—Civil No. 1293. Praecipe for Transcript of Record. Filed at Shanghai, China, Nov. 12, 1928. (Signed) James M. Howes, Clerk.

[Title of Court and Cause.]

**PRAECIPE FOR TRANSCRIPT OF RECORD.**

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit pursuant to the appeal allowed in the above-entitled cause and to include in such transcript of record the following and no other papers or exhibits, to wit:

1. Complaint.
2. Answer.
3. Reply.
4. Defendant's Exhibits 1, 2 and 3.
5. Decision and judgment.
6. Motion for a new trial.
7. Bill of exceptions and order approving and settling same.
8. Petition for appeal.
9. Assignment of errors.

10. Order allowing appeal and fixing amount of bond. [54]
11. Cost and supersedeas bond.
12. Citation and service of same.
13. Copy of this praecipe.

—and file said transcript with the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated at Shanghai, China, this 1st day of November, 1928.

FLEMING, FRANKLIN & ALLMAN.

By C. S. FRANKLIN,

Attorneys for Defendant (Appellant).

I acknowledge having received a copy of this praecipe this 6th day November, 1928.

(Sgd.) P. H. B. KENT,

(KENT & MOUNSEY.) [55]

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Cause No. 3067—Civil No. 1293. Certificate of Clerk of the United States Court for China to Transcript of Record. Filed at Shanghai, China, November, 1928. ———, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. COURT FOR  
CHINA TO TRANSCRIPT OF RECORD.

United States of America,  
Extraterritorial Jurisdiction in China,  
Consular District of Shanghai,—ss.

I, James M. Howes, Clerk of the United States Court for China, do hereby certify and return that

the foregoing is a true and correct copy of the record and proceedings in the above-entitled case, Bank of China et al., Plaintiffs, vs. R. T. McDonnell etc., Defendant, Cause No. 3067, in this court, as required by praecipe filed by defendant on November 12, 1928, and as the originals thereto appear on file and of record in my office in said United States Court for China.

ATTEST my hand and the seal of said United States Court for China, at Shanghai, China, on this 30th day of November, 1928.

[Seal]

JAMES M. HOWES,

Clerk. [56]

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[Endorsed]: No. 5687. United States Circuit Court of Appeals for the Ninth Circuit. R. T. McDonnell, Assignee, American Overseas Warehouse Company, Inc., Appellant and Cross-Appellee, vs. Bank of China, Bank of Communications, Exchange Bank of China, China & South Sea Bank, Agricultural and Industrial Bank of China, Chinese American Bank of Commerce, Chung Yuan Industrial Bank, National Commercial Bank Limited, Bank of Agriculture & Commerce, Banque Franco-Chinoise and Shih Fu Sheng, Appellees and Cross-Appellants. Transcript of Record. Upon Appeal and Cross-Appeal from the United States Court for China.

Filed January 14, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



United States

Circuit Court of Appeals

For the Ninth Circuit.

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BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK, LTD., BANK OF AGRICULTURE AND COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,

Cross-Appellants,

vs.

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.,

Cross-Appellee.

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Transcript of Record.

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Upon Cross-Appeal from the United States Court for  
China.

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Cause No. 3067—Civil No. 1293. Reply. Filed at Tientsin, China, 22 May, 1928. James M. Howes, Clerk.

[Title of Court and Cause.]

REPLY.

Now come the plaintiffs and respectfully show unto this Honorable Court by way of reply to the answer herein:

1. The plaintiffs deny that the National City Bank of New York is the holder of any godown warrants or documents of the American Overseas Warehouse Company, Incorporated, entitled to rank with the warrants held by the plaintiffs.

2. The plaintiffs admit that the said Bank holds certain documents bearing an endorsement by the said Warehouse Company as follows:

“We have received the goods mentioned in this instrument and will hold same to the order of the NATIONAL CITY BANK OF NEW YORK and we hereby transfer all our rights under this instrument to THE NATIONAL CITY BANK OF NEW YORK.”

But the plaintiffs deny that the said goods were ever received by the said Warehouse Company as alleged in the said endorsement.

3. By way of alternative defense to the defendant's claim on behalf of the National City Bank of New York the plaintiffs deny that if any of the said goods were received by the said Warehouse

Company, they were received under such conditions as constituted a valid pledge thereof.

4. By way of further alternative defense the plaintiffs deny that if any part of the said goods were ever received by the said Warehouse Company under such conditions as to constitute a valid pledge thereof, the said Warehouse Company continued to retain the same or had any property therein in respect of any such pledge or hypothecation on or about the 9th day of July, 1927, when the said company ceased to do business and from which date the assignment by the said company to the defendant as assignee operated.

(Sgd.) P. H. B. KENT,  
Attorney for Plaintiffs.

EXHIBIT "D."

THE AMERICAN OVERSEAS WAREHOUSE  
COMPANY, INC.

August 30, 1926.

Banque Franco-Chinoise Pour le Commerce et  
l'Industrie Tientsin.

Dear Sirs:—

We take pleasure in enclosing copy of our balance sheet audited as at June 30, 1926.

Our new godown on the corner of Korostovetz and Poppe Roads in the Third Special Area will soon be completed which together with our present godown at 29 Seymour Road, British Concession will be a convenience to our clients.

Many banking institutions in Tientsin are finding it convenient to have a neutral godown managed

by a company which does no import and export business. All of our clients appreciate the confidential nature of our business and bank's clients have no objection to having their cargo stored with *as*.

The usual rates are charged for storage and we insure all cargo placed in our godowns without cost to the owners.

We are prepared to advance money on goods stored in our godown thus being in a position to assist your clients, on your recommendations, in case they desire to borrow on cargo in which you are not interested.

Very truly yours,

THE AMERICAN OVERSEAS WARE-  
HOUSE CO., INC.

Signed—C. H. CORNISH,  
General Manager.

## EXHIBIT "E."

Cause 3067. Exhibit "E." United States Court for China. Not admitted.

## GREEN BATTLESHIP BRAND.

1st Transaction between the Warehouse Company and National City Bank, April 8th, 1927, 10,000 bags.

Date	Received in Godown	Issued Out of Godown	Godown Warrants.
In Godown, Dec. 31st, 1926.	14,135 bags	—	—
January 1st to April 8th	24,921 "	24,669 bags	—
March 8th	—	—	Nos. 3592/3 held by China and South Sea Bank—10,000 bags.
March 18th	—	—	Nos. 3607/12 held by Banque Franco-Chinoise—30,000 bags.

2nd Transaction between the Warehouse Company and National City Bank, April 21st, 1927, 15,000 bags.  
On April 14th there was no free flour available to Union Trading Corporation to deal with as appears from above statement.

Date	Received in Godown	Issued Out of Godown	Godown Warrants.
April 9th to April 21st, 1927.	5,000 bags	—	—
April 1st to April 23rd.	—	1,680 bags	—
April 24th	3,100 bags	—	—
April 26th	5,000 bags	5,000 bags	No. 3626 held by China and South Sea Bank—10,000 bags.

GREEN BATTLESHIP BRAND.

3rd Transaction between the Warehouse Company and National City Bank, June 14th, 1927, 12,000 bags.

Date	Received in Godown	Issued Out of Godown	Godown Warrants.
April 27th—May 2nd, 1927.	11,533 bags	8,000 bags	—
May 2nd, 1927.	—	—	No. 3634 held by China and South Sea Bank (originally by Banque Franco-Chinoise)—15,000 bags.
May 3rd—June 3rd, 1927.	13,748 bags	13,563 bags	—
June 9th, 1927.	—	—	No. 3902 held by China and South Sea Bank—15,000 bags.
June 10th, 1927.	10,030 bags	—	—
June 12th to 16th, 1927.	—	1,838 bags	—
June 20th, 1927.	—	—	Nos. 2912/13 held by China and South Sea Bank—30,000 bags.

LOTUS BRAND.

1st Transaction between the Warehouse Company and National City Bank, March 22nd, 1927, 10,000 bags.			
Date.	Received in Godown.	Issued Out of Godown	Godown Warrants.
In Godown Dec. 31st, 1926.	1,155 bags	—	—
January 1st to March 22nd, 1927.	6,092 “	6,000 bags	
March 29th.	—	—	No. 3615 held by Banque Franco-Chinoise—7,500 bags
2nd Transaction between the Warehouse Company and National City Bank, April 21st, 1927, 24,000 bags.			
Date.	Received in Godown.	Issued Out of Godown	Godown Warrants.
April 21st, 1927.	23,976 bags	—	—
April 21st—April 28th, 1927.	—	675 bags	No. 3630 held by Bank of Communications—20,000 bags.
April 28th, 1927.	—	—	No. 3677 held by Bank of China—4,000 bags.
June 3rd, 1927.	—	—	No. 3921 held by China & South Sea Bank—20,000 bags.
June 27th, 1927.	—	—	
Between April 21st & July 7th, 1927.	—	9,847 bags	
July 5th, 1927.	12,000 bags	—	
July 7th, 1927.	—	—	No. 3928 held by The National Commercial Bank—12,000 bags.



## EGYPTIAN BRAND.

1st Transaction between the Warehouse Company and National City Bank, April 5th, 1927, 35,000 bags.

Date	Received in Godown	Issued Out of Godown	Godown Warrants.
In Godown December 31st, 1926.	8,797 bags	—	—
Jan. 1st—April 4th, 1927.	—	3,000 bags	—
April 4th, 1927.	15,002 bags	—	—
April 30th.	14,943 bags	—	—
April 4th—30th.	—	19,717 bags	—
May 1st—31st.	—	15,073 bags	—
	38,742 bags	37,790 bags	—

2nd Transaction between the Warehouse Company and National City Bank, June 14th, 1927, 20,000 bags.  
 May 23rd — — — — — Warrant No. 3661 (subsequently exchanged for Warrant No. 3919) for 60,000 bags against Bill of Lading surrendered by Bank to obtain delivery.

June 1st	36,994 bags	—	—
June 2nd	22,981 bags	—	—
June 1st—13th	—	39,130 bags	—
June 14th—30th	—	15,262 bags	—
July 7th	150 bags	2,040 bags	—
	60,125 bags	56,432 bags	—

SHANGHAI PLAIN ALTERNATIVELY REFERRED TO AS SHANGHAI FLOUR.

(Note: This is not a brand but a name to cover flour from broken bags rebagged in plain bags, irrespective of brand. There is no record in the books.)

1. Jan. 1st to July 9th, 1927. Amount issued from godown, according to endorsements on warrants. . . . . 22,000 bags
2. Prior to April 5th, 1927, the date of the first transaction in which the National City Bank was interested, the amount being 10,000 bags, the following godown warrants were issued:
 

No. 3539.	January 6th, 1927, held by China and South Sea Bank . . . . .	10,000 bags
No. 3540.	January 6th, 1927, held by China and South Sea Bank . . . . .	10,000 bags
No. 3541.	January 6th, 1927, held by China and South Sea Bank . . . . .	10,000 bags
3. Prior to May 9th, 1927, the date of the second transaction in which the National City Bank was interested, which was for 15,000 bags, the following warrants were issued:
 

No. 3645.	May 5th, 1927, held by China and South Sea Bank . . . . .	4,000 bags
No. 3646.	May 5th, 1927, held by China and South Sea Bank . . . . .	5,000 bags



We are a neutral warehouse company and assume responsibility for all cargo covered by our godown warrants and demand that the lock be removed from our premises at once. If you are unwilling to do this we are in a position to recommend another banking institution to the Union Trading Corporation or to advance money against this cargo ourselves.

If the lock is not removed from our premises this afternoon we shall request the Union Trading Corporation to remove the cargo from our premises.

We permit no one to place locks on our godowns other than ourselves nor do we permit any sign or seals to be placed on our doors. Anyone who is unwilling to comply with our rules we must ask to make other arrangements.

A copy of this letter is being sent to the Union Trading Corporation for their information.

Very truly yours,

THE AMERICAN OVERSEAS WAREHOUSE CO., INC.

C. H. CORNISH,  
General Manager.

CHC:ETC.

[Two characters appear here that were difficult to decipher.]

Cause No. 3067—Civil No. 1293. Certificate of Clerk of the United States Court for China to Transcript of Record. Filed at Shanghai, China, November 30, 1928. James M. Howes, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF UNITED STATES COURT FOR CHINA TO TRANSCRIPT OF RECORD.

United States of America,  
Extraterritorial Jurisdiction in China,  
Consular District of Shanghai,—ss.

I, James M. Howes, Clerk of the United States Court for China, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the above-entitled case, Bank of China et al., Plaintiffs, vs. R. T. McDonnell, etc., Defendant, Cause No. 3067, as required by praecipe filed by plaintiff on November 12, 1928, and as the originals thereto appear on file and of record in my office in said United States Court for China.

ATTEST my hand and the seal of said United States Court for China, at Shanghai, China, on this 30th day of November, 1928.

[Seal]

JAMES M. HOWES,  
Clerk.

Cause No. 3067—Civil No. 1293. Petition for Appeal. Filed at Shanghai, China, October 9th, 1928. (Signed) James M. Howes, Clerk.

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER  
ALLOWING SAME.

The plaintiffs above named, by Kent and Mounsey, their attorneys, conceiving themselves aggrieved by the decision and judgment made and entered in the United States Court for China on July 16th, 1928, in the above-entitled proceedings so far as concerns the order that the defendant apportion to the National City Bank of New York a sum proportionate to the flour covered by warrant No. 3621 dated April 8th, 1927, and that accordingly the defendant pay to the National City Bank of New York either the sum of Mexican \$6,600.90 or Mexican \$3,300.45 according as the defendant took over flour of Green Battleship brand only or of both Green and Red Battleship from the American Overseas Warehouse Co., Inc., as assignee thereof, do hereby appeal from said decision and judgment in the foregoing respect to the United States Circuit Court of Appeals for the Ninth Circuit, and they pray that this appeal may be allowed, that citation issue as provided by law and that a transcript of the record and proceedings and papers upon which said decision and judgment was made, duly authenticated, may be sent to the United States Circuit Court for the Ninth Circuit.



Dated at Tientsin, China, this 3d day of October, 1928.

(Signed ) KENT & MOUNSEY,  
Counsel for Plaintiffs-Appellants,  
2 & 4 Victoria Terrace, Tientsin, North China.

And now, to wit, on the 20th day of October, 1928, IT IS ORDERED that the appeal be allowed as prayed.

(Signed) MILTON D. PURDY,  
Judge, United States Court for China.

Citation waived November 12th, 1928.

FLEMING, FRANKLIN & ALLMAN,  
Attorneys for Defendant.

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Cause No. 3067—Civil No. 1293. Assignment of Errors. Filed at Shanghai, China, October 9th, 1928. (Signed) James M. Howes, Clerk.

[Title of Court and Cause.]

#### ASSIGNMENT OF ERRORS.

Now come the plaintiffs above named, by Kent and Mounsey, their attorneys, and in furtherance of their appeal make and file this their assignment of errors which they aver occurred in the trial and decision of this cause in the United States Court for China.

1. The Court erred in finding and deciding in its decision and judgment filed July 16th, 1928, that the National City Bank of New York was entitled

to participate in the proceeds of flour held by the defendant as assignee of the American Overseas Warehouse Co., Inc., in respect of Warrant No. 3621, dated April 8th, 1927, held by the National City Bank of New York and purporting to have been issued by the American Overseas Warehouse Company, Incorporated, in respect of 10,000 bags of Green Battleship flour and 10,000 bags Red Battleship flour.

2. The Court erred in not holding and deciding that warrant No. 3621 aforesaid purporting to have been issued in respect of certain flour, having been issued by the American Overseas Warehouse Company, Incorporated, in support of and subsequent to an assignment to the National City Bank of New York of the benefit of an alleged pledge of the same flour by the Union Trading Corporation to the American Overseas Warehouse Company, Incorporated, dated the 8th day of April, 1927, was of no effect.

3. The Court erred in not holding and deciding that the National City Bank being already assignee of the benefit of an alleged pledge of the flour purporting to be covered by warrant No. 3621 aforesaid, the said warrant was taken by the Bank with notice that the Warehouse Company only purported to have a special property in the said flour as pledgee, and was not in a position to issue in respect thereof a negotiable receipt such as the said warrant constituted.

4. The Court erred in not holding and deciding that the effect of godown warrant No. 3621 afore-

said in the hands of the National City Bank of New York was limited to the effect of the assignment of the benefit of an alleged pledge in respect of the same flour by the Union Trading Corporation to the American Overseas Warehouse Company, Incorporated, dated on the same day, namely, April 8th, 1927, but prior to the issue of the said warrant.

5. The Court erred in not holding and deciding that the transactions between the Union Trading Corporation and the American Overseas Warehouse Company, Incorporated, and the assignments thereof to the National City Bank of New York were not transactions in the ordinary course of the business of the American Overseas Warehouse Company, Incorporated, as warehousemen and could not be made the subject of godown warrants.

6. The Court erred in not finding and deciding that the position of the American Overseas Warehouse Company, Incorporated, in respect of the flour purporting to be covered by warrant No. 3621 aforesaid, could not be in a better position as pledgee than if purporting to be owner thereof, and that since a warehouseman cannot issue a valid warehouse receipt in respect of his own property the Warehouse Company could not issue a valid negotiable receipt in respect of the flour of which it was only an alleged pledgee.

7. The Court erred in not finding and deciding that a warehouseman cannot issue a valid warehouseman's receipt by way of security for his own indebtedness and that in consequence godown war-

to participate in the proceeds of flour held by the defendant as assignee of the American Overseas Warehouse Co., Inc., in respect of Warrant No. 3621, dated April 8th, 1927, held by the National City Bank of New York and purporting to have been issued by the American Overseas Warehouse Company, Incorporated, in respect of 10,000 bags of Green Battleship flour and 10,000 bags Red Battleship flour.

2. The Court erred in not holding and deciding that warrant No. 3621 aforesaid purporting to have been issued in respect of certain flour, having been issued by the American Overseas Warehouse Company, Incorporated, in support of and subsequent to an assignment to the National City Bank of New York of the benefit of an alleged pledge of the same flour by the Union Trading Corporation to the American Overseas Warehouse Company, Incorporated, dated the 8th day of April, 1927, was of no effect.

3. The Court erred in not holding and deciding that the National City Bank being already assignee of the benefit of an alleged pledge of the flour purporting to be covered by warrant No. 3621 aforesaid, the said warrant was taken by the Bank with notice that the Warehouse Company only purported to have a special property in the said flour as pledgee, and was not in a position to issue in respect thereof a negotiable receipt such as the said warrant constituted.

4. The Court erred in not holding and deciding that the effect of godown warrant No. 3621 afore-

said in the hands of the National City Bank of New York was limited to the effect of the assignment of the benefit of an alleged pledge in respect of the same flour by the Union Trading Corporation to the American Overseas Warehouse Company, Incorporated, dated on the same day, namely, April 8th, 1927, but prior to the issue of the said warrant.

5. The Court erred in not holding and deciding that the transactions between the Union Trading Corporation and the American Overseas Warehouse Company, Incorporated, and the assignments thereof to the National City Bank of New York were not transactions in the ordinary course of the business of the American Overseas Warehouse Company, Incorporated, as warehousemen and could not be made the subject of godown warrants.

6. The Court erred in not finding and deciding that the position of the American Overseas Warehouse Company, Incorporated, in respect of the flour purporting to be covered by warrant No. 3621 aforesaid, could not be in a better position as pledgee than if purporting to be owner thereof, and that since a warehouseman cannot issue a valid warehouse receipt in respect of his own property the Warehouse Company could not issue a valid negotiable receipt in respect of the flour of which it was only an alleged pledgee.

7. The Court erred in not finding and deciding that a warehouseman cannot issue a valid warehouseman's receipt by way of security for his own indebtedness and that in consequence godown war-



rant No. 3621 aforesaid held by the National City Bank of New York invalid and of no effect.

8. The Court erred in finding and deciding that the legal effect of the transaction between the American Overseas Warehouse Company, Incorporated, and the National City Bank of New York was that the Bank had deposited with the American Overseas Warehouse Company, Incorporated, the flour purporting to be covered by godown warrant No. 3621 aforesaid.

WHEREFORE, the plaintiffs pray that the decision and judgment of the United States Court for China dated the 16th day of July, 1928, be reversed so far as concerns the order to pay to the National City Bank of New York a portion of the proceeds of flour in the hands of the defendant and that the United States Court for China be directed to order distribution of the balance of the said proceeds in the defendant's hands amongst the plaintiffs in accordance with the principles of distribution adopted as amongst the plaintiffs in respect of proceeds of the said flour already distributed.

Dated at Tientsin, China, the 3d day of October, 1928.

(Signed) KENT & MOUNSEY,  
Counsel for Plaintiffs-Appellants,  
2 & 4 Victoria Terrace, Tientsin, North China.



Cause No. 3067—Civil No. 1293. Certificate of Clerk of the United States Court for China to Petition for Appeal and Assignment of Errors. Filed at Shanghai, China, 4 Jan., 1929. James M. Howes, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. COURT FOR  
CHINA TO PETITION FOR APPEAL AND  
ASSIGNMENT OF ERRORS.

United States of America,  
Extraterritorial Jurisdiction in China,  
Consular District of Shanghai,—ss.

I, James M. Howes, Clerk of the United States Court for China, do hereby certify and return that the foregoing is a true and correct copy of the petition for appeal and assignment of errors in the above-entitled case, *Bank of China et al.*, Plaintiffs, vs. *R. T. McDonnell, etc.*, Defendant, Cause No. 3067, as required by amended praecipe filed by plaintiff and as the originals thereto appear on file and of record in my office in said United States Court for China.

ATTEST my hand and the seal of said United States Court for China, at Shanghai, China, on this 28th day of December, 1928.

[Seal]

JAMES M. HOWES,  
Clerk.

[Endorsed]: Filed Jan. 24, 1929. Paul P. O'Brien, Clerk.

For the Exchange Bank of China, Tientsin,  
 T. H. SING,  
 Assistant Manager.  
 Banque Franco-Chinoise Pour le Commerce  
 et l'Industrie.

H. BAR.

J. REINSTR.

Executed by the several plaintiffs in the presence  
 of:

P. H. B. KENT,  
 Barrister-at-Law, Tientsin.  
 China & South Sea Bank, Ltd.,  
 Y. P. LI,  
 Sub-manager.  
 The National Commercial Bank, Ltd.,  
 E. N. CHU,  
 Sub-Manager.  
 The Agricultural & Industrial Bank of China,  
 W. C. CHANG,  
 Manager.  
 Chung Yuan Industrial Bank,  
 (In Chinese Characters),  
 C. T. LU.

Approved.

(Sgd.) FLEMING, FRANKLIN & ALLMAN,  
 Attorneys for Defendant.

Approved.

(Sgd.) RICHARD T. EVANS,  
 Counsel for Defendant.

Oct. 6, 1928.

Approved 12 Nov., '28.

(Sgd.) MILTON D. PURDY,  
Judge, United States Court for China.

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Cause No. 3067—Civil No. 1293. Certificate of Clerk of the United States Court for China to Transcript of Record. Filed at Shanghai, China, January 25, 1929. James M. Howes, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. COURT FOR  
CHINA TO TRANSCRIPT OF RECORD.

United States of America,  
Extraterritorial Jurisdiction in China,  
Consular District of Shanghai,—ss.

I, James M. Howes, Clerk of the United States Court for China, do hereby certify and return that the foregoing is a true and correct copy of the bond on appeal in the above-entitled case, Bank of China et al., Plaintiffs, vs. R. T. McDonnell, etc., Defendant, Cause No. 3067, as required by amended praecipe filed by plaintiffs on January 24, 1929, and as the original thereto appears on file and of record in my office in said United States Court for China.

ATTEST my hand and the seal of said United States Court for China, at Shanghai, China, on this 25th day of January, 1929.

[Seal]

JAMES M. HOWES,  
Clerk.

[Endorsed]: Filed Feb. 12, 1929. Paul P. O'Brien, Clerk.

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Cause No. 3067—Civil No. 1293. Affidavit of Service. Filed at Shanghai, China, February 4th, 1929. James M. Howes, Clerk.

[Title of Court and Cause.]

### AFFIDAVIT OF SERVICE.

Republic of China,  
Province of Chihli,  
City of Tientsin,  
Consulate General of the United States of  
America,—ss.

I, Percy Horace Braund Kent, Barrister-at-Law at Tientsin in China, make oath and say as follows:

1. I am a partner in the firm of Kent and Mounsey and a counsel for the plaintiffs-appellants in this case. Counsel for the defendant-appellant is C. S. Franklin, of the firm of Fleming, Franklin & Allman at Shanghai in China.

2. On the 3d day of October, 1928, my said firm addressed a letter to Messrs. Fleming, Franklin & Allman enclosing copy of petition for appeal and assignment of errors filed on behalf of the plaintiffs-appellants with the Clerk of the United States Court for China, and notifying Messrs. Fleming, Franklin and Allman that a bond for Mex. \$2,000 would be filed in due course. The said letter was registered. A copy of the said letter marked "P. H. B. K. 1" is produced and shown to me and

attached hereto. The postal registration slip marked "P. H. B. K. 2" is produced and shown to me and attached hereto.

3. By letter dated October 31st, 1928, Messrs. Fleming, Franklin & Allman, without specifically acknowledging service of the above two pleadings or receipt of the letter, replied in substance to the said letter exhibited hereto as aforesaid, and undertook to endorse waiver of citation on plaintiffs-appellants' said petition for appeal. They also promised to approve plaintiffs-appellants' appeal bond in due course. Messrs. Fleming, Franklin & Allman's letter marked "P. H. B. K. 3" is produced and shown to me and attached hereto.

4. The appeal bond filed herein on behalf of the plaintiffs-appellants was approved by R. T. Evans, attorney and counsellor at law at Tientsin, acting as agent for Messrs. Fleming, Franklin & Allman, and a copy served on the said R. T. Evans. To the best of my knowledge and belief a copy was also sent to Messrs. Fleming, Franklin & Allman, who as stated in paragraph 2 hereof has been previously advised in the matter of the appeal bond in the letter exhibited hereto and marked "P. H. B. K. 1" and has undertaken to approve the same by their letter in reply marked "P. H. B. K. 3."

5. Waiver of citation and the order of the Judge were endorsed upon the plaintiffs-appellants' petition for appeal.

6. I verily believe that all proper service has been

made upon counsel of the defendant-appellant herein of all documents.

(Sgd.) P. H. B. KENT.

PERCY HORACE BRAUND KENT.

Sworn at Tientsin by the said Percy Horace Braund Kent, the 30th day of January, 1929.

Subscribed and sworn to before me,

GRP. (Sgd.) GEORGE R. PASCHAL,  
United States Vice-consul, Tientsin.

American Consulate General.

(Fee Stamp.)

Jan. 30, 1929. Misc. Service.  
Tientsin, China. No. 320

(Copy)

“P. H. B. K. 1”

3rd. October, 1928.

Messrs. Fleming, Franklin & Allman,  
24, The Bund,  
Shanghai.

Dear Sirs,

Bank of China et als. v. R. T. McDonnell.

In continuation of our letter of the 1st. instant, we beg to enclose copy of petition for appeal and Assignment of Errors, originals of which we are despatching to-day to the Clerk of the United States Court for China. We also enclose copy of covering despatch.

You will notice that we have endorsed on the Petition for Appeal a waiver of citation. We shall be much obliged if you will attend at the Court and



complete this endorsement, in response to which we will of course perform any similar office you may require. We shall be glad if you will inform us that this is in order and, if not, whether you expect us to file citation.

We regret that our unfamiliarity with procedure on appeal prevents us from understanding either the form or the reason for the Bill of Exceptions. We presume its object is to advise the Appeal Court of your objections to part of the evidence, which presumably they will rule upon before taking into consideration the evidence in question. We presume that we are not under any obligation to put in a document of this kind, although we notice that our Exhibits "A," "B," and "C" are not referred to, which appears to us to stultify the certificate of the Official Reporter and your contention that the Bill of Exceptions contains all the evidence received upon the trial of the action. You will recall that our Exhibits "A," "B" and "C" were attached to the Complaint in pursuance of the rules of the Remedial Code. We should be grateful for some indication as to how this omission should be remedied.

We understand from Mr. Evans that in due course you will submit for our approval the draft Record, which for convenience and saving time will presumably be a printers' proof.

With reference to the Bond, we have suggested to Mr. Evans the sum of Mex. \$70,000.00 and we hear from him that this is quite in order. We are pro-

and are admitted in our answer. They will of course be incorporated with the complaint in the record on appeal.

The Clerk of the Court has asked if we could obtain for him a copy of your Exhibit "C," being McDonnell's distribution scheme. We have not an extra copy ourselves, but if you could send one to us, it would save the Clerk the labor of making a copy.

Yours faithfully,

FLEMING, FRANKLIN & ALLMAN,

(Signed) By C. S. FRANKLIN.

CSF:MT.

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Cause No. 3067—Civil No. 1293. Acknowledgment of Service. Filed at Shanghai, China. February 5, 1929. L. T. Kenake, Asst. Clerk.

[Title of Court and Cause.]

#### ACKNOWLEDGMENT OF SERVICE.

Now comes the defendant above named by Fleming, Franklin & Allman, his attorneys, and acknowledges due service of the following pleadings filed by the plaintiff above named, to wit, petition for appeal, assignment of errors, appeal bond and citation. This acknowledgment of service is filed at the request of *Council* for the plaintiff.

Dated at Shanghai, China, this 5th day of February, 1929.

FLEMING, FRANKLIN & ALLMAN.

By C. S. FRANKLIN,

Attorneys for Defendant.

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Cause No. 3067—Civil No. 1293. Praeceptum for Transcript of Record. Filed at Shanghai, China, 12 Nov. '28. John M. Howes, Clerk.

[Title of Court and Cause.]

PRAECEPTUM FOR TRANSCRIPT OF RECORD.

Sir: Please take notice that the appellant designates the following as the portions of the record in this cause to be incorporated into the transcript on its appeal:

1. Complaint filed April 27th, 1928.
2. Answer filed May 17th, 1928.
3. Reply filed May 19th, 1928.
4. Plaintiffs' Exhibits "A," "B," "C," "D," "E," "F."

(Sgd.) P. H. B. KENT,  
(KENT & MOUNSEY, Tientsin.)  
Counsel for Plaintiffs-Appellants.

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Cause No. 3067—Civil No. 1293. Praeceptum for Transcript of Record. Filed at Shanghai, China, 3 Jan., 1929. (Sgd.) James M. Howes, Clerk.

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

Sir: Please take notice that the appellants designate the following as the portions of the record in this cause to be incorporated into the transcript on its appeal:

1. Complaint filed April 27th, 1928.
2. Answer filed May 17th, 1928.
3. Reply filed May 19th, 1928.
4. Plaintiffs' Exhibits "A," "B," "C," "D," "E," "F."
5. Plaintiffs' petition of appeal.
6. Plaintiffs' assignment of errors.

(Sgd.) P. H. B. KENT,  
(KENT & MOUNSEY),  
Counsel for Plaintiffs-Appellants.

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Cause No. 3067—Civil No. 1293. Praecipe for Transcript of Record. Filed at Shanghai, China, 24 Jan., 1929. James M. Howes, Clerk.

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

Sir: Please take notice that the appellants designate the following as the portions of the record in this cause to be incorporated into the transcript on its appeal:

1. Complaint filed April 27th, 1928.

2. Answer filed May 17th, 1928.
3. Reply filed May 19th, 1928.
4. Plaintiffs' Exhibits "A," "B," "C," "D," "E," "F."
5. Plaintiffs' petition of appeal.
6. Order allowing plaintiffs' appeal.
7. Plaintiffs' assignment of errors.
8. Endorsement of defendant's waiver of citation by plaintiffs.
9. Plaintiffs' bond.

(Sgd.) P. H. B. KENT,  
KENT & MOUNSEY,  
Counsel for Plaintiffs-Appellants.

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Cause No. 3067—Civil No. 1293. Praeceptum for Transcript of Record. Filed at Shanghai, China, 4 Feb., 1929. James M. Howes, Clerk.

[Title of Court and Cause.]

#### PRAECEPTUM FOR TRANSCRIPT OF RECORD.

Sir: Please take notice that the appellants designate the following portions of the record in this cause to be incorporated in a supplemental transcript on its appeal supplementing the documents named in the praecipia already filed herein.

1. Affidavit of service on counsel for defendant-appellant of plaintiffs-appellants' petition of appeal, assignments of errors and appeal bond.
2. Certificate by counsel of defendant-appellant

of service of documents above referred to and waiver of citation.

3. Certificate that appeal bond has been approved by Judge of U. S. Court.

4. Praecipe and supplemental praecipe filed herein.

P. H. B. KENT,  
Counsel for Plaintiffs-Appellants

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Cause No. 3067—Civil No. 1293. Certificate of Clerk of the United States Court for China to Transcript of Record. Filed at Shanghai, China, February 7, 1929. James M. Howes, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. COURT FOR  
CHINA TO TRANSCRIPT OF RECORD.

United States of America,  
Extraterritorial Jurisdiction in China,  
Consular District of Shanghai,—ss.

I, James M. Howes, Clerk of the United States Court for China, do hereby certify and return that the foregoing is a true and correct copy of the—

- (1) Affidavit of service on counsel for defendant-appellant of plaintiffs-appellants' petition of appeal, assignment of errors and appeal bond.
- (2) Certificate by counsel of defendant-appellant of service of documents above referred to and waiver of citation.



(3) Praeceptum and supplemental praecipia filed herein

—filed in the above-entitled case, Bank of China et al., Plaintiffs, vs. R. T. McDonnell, etc., Defendant, Cause No. 3067, as required by supplementary praecipum filed by plaintiffs, and as the originals thereto appear on file and of record in my office in said United States Court for China.

ATTEST my hand and the seal of said United States Court for China, at Shanghai, China, on this 7th day of February, 1929.

[Seal]

JAMES M. HOWES,  
Clerk.

[Endorsed]: Additional Appeal Papers Required by Supplemental Praecipum of Plaintiffs. Filed Feb. 28, 1929. Paul P. O'Brien, Clerk.

